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Issue Date: 04 February 2004

In the Matter of
DEBBIE I. ROBINS
Claimant

Case No.: 2003 LHC 550

v.

MATSON TERMINALS/
FRANK GATES ACCLAIM
Employer/Carrier

OWCP No.: 15-45688

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest

Appearances: Mr. Jay Friedheim, Attorney
For the Claimant

Mr. Randy Baldemore, Attorney
For the Employer

Before: Richard T. Stansell-Gamm
Administrative Law Judge

DECISION AND ORDER -
PARTIAL AWARD OF TEMPORARY TOTAL DISABILITY COMPENSATION
DENIAL OF MEDICAL TREATMENT REIMBURSEMENT CLAIM

This case involves a claim filed by Ms. Debbie Robins for disability and medical benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 to 950, as amended ("the Act"). In October 2002, through counsel, Ms. Robins filed a pre-hearing statement seeking medical treatment, choice of physician and temporary disability compensation for an injury she suffered while working for Matson Terminals ("the Employer") on December 12, 2001. On November 27, 2002, the District Director forwarded the pre-hearing statement to the Office of Administrative Law Judges. Pursuant to a Notice of Hearing, dated January 29, 2003 (ALJ I),[1] I conducted a formal hearing on May 14, 2003 in Honolulu, Hawaii, attended by Ms. Robins, Mr. Friedheim, and Mr. Baldemore.

[1]The following notations appear in this decision to identify exhibits: CX – Claimant exhibit; EX – Employer exhibit; ALJ – Administrative Law Judge exhibit; and TR – Transcript.

Evidentiary Comments

At the hearing, I admitted without objection, CX 1 to CX 10 and CX 12 to CX 16. Upon preparation of this decision, I discovered that CX 10 on the Claimant's exhibit list is captioned: "Employment records showing sick days and vacation time (**to be produced upon receipt**)" However, no documents were located behind the tab labeled "CX 10." CX 14 does contain monthly postings showing sick and leave time taken by the Claimant. Additionally, Mr. Urabe testified at the hearing concerning Ms. Robins' sick leave balances. Accordingly, I designate CX 10 as "not used."

At the hearing, I admitted into evidence EX 1 to EX 21. However, upon subsequent examination, EX 14 is marked "withdrawn."

Due to hearing time constraints, the cross-examination of Dr. Portner was accomplished by deposition on July 17, 2003 and is now admitted into evidence as EX 24. Likewise, the testimony of Dr. Nakano is presented by a deposition, dated July 21, 2003, and now admitted into evidence as EX 23.

At Dr. Portner's July 17, 2003 cross-examination deposition, after the physician reviewed some of his files concerning Ms. Robins, counsel for the Employer asked that those medical records be attached to the deposition. Claimant's counsel objected because the Employer had not presented those records at the hearing before me. My review of the file indicates that the record contains portions of Dr. Yokochi's treatment notes, which are already in the record at CX 4, summarization of Dr. Portner's September 2002 evaluation, which has been admitted as CX 3, and Dr. Portner's treatment notes for Ms. Robins and related medical tests from the end of March 2003 through the date of the deposition. Since as Employer counsel noted, Dr. Portner was relying on his treatment notes to answer questions, and considering the treatment notes relate primarily to Ms. Robins' neck condition, I over-rule the objection of Claimant's counsel and admit Dr. Portner's treatment notes as EX 25.[2]

CX 11 was identified as a picture of a blocking board to be provided post-hearing. I received the picture in August 2003, marked as CX 17. At Dr. Portner's deposition, counsel for the Employer objected to the picture because Dr. Portner was also in the picture, holding the long block of wood length-wise. Since the block of lumber appears to be the same as the item present at the hearing, I admit the picture as CX 17 and will simply ignore Dr. Portner's presence in it. Additionally, CX 11 is "not used."

Consequently, my decision in this case is based on the hearing testimony and all the documents admitted into evidence: CX 1 to CX 9, CX 12 to CX 17, EX 1 to EX 13, and EX 15 to EX 25.

[2]Earlier in the same deposition another copy of Dr. Portner's September 2002 evaluation of Ms. Robins was also attached. As noted above, that document was already admitted as CX 3.

ISSUES

1. Nature and extent of disability

2. Choice of physician

Parties' Positions

Claimant[3]

On December 12, 2001, Ms. Robins was injured at work when she was struck by a large board in the head. At that time, she was employed as a stevedore and machine operator, which required climbing on shipping containers, lashing containers, and operating heavy machinery, including a hustler. After the impact, Ms. Robins blacked out temporarily. Her supervisor took her to the hospital where she received treatment from Dr. Yokochi. Dr. Yokochi treated her for several months. However, concerned that she was not getting better, Ms. Robins notified the Employer that she wanted to change her treating physician.

In response, the Employer sent Ms. Robins to Dr. Nakano who conducted an evaluation without her consent. In light of a prior history of migraine headaches, Dr. Nakano prescribed migraine medication. The Employer also sent Ms. Robins to two other physicians for evaluation. Eventually, the Employer declared further medical treatment was unnecessary because Ms. Robins' headache problems related to a pre-existing condition.

Initially, Dr. Yokochi expressed his opinion that Ms. Robins' neck problem was unresolved. However, he eventually released her to return to work in May/June 2002. Upon return to work, Ms. Robins experienced continued problems. Since the Employer refused further medical treatment, Ms. Robins went to Dr. Portner who believed Ms. Robins needed an MRI. The subsequent MRI disclosed Ms. Robins has significant problems with her neck. He also suggested Ms. Robins see either a surgical specialist or a physiatrist. When she expressed her continued desire for a different doctor, the Employer indicated she didn't have a right to choose another physician. As a result, Ms. Robins went to Dr. Portner on her own and seeks compensation for the medical treatment that he is providing.

Due to severe economic pressures, Ms. Robins has been forced to return to work. Part of that employment involves driving a Hustler which aggravated her neck condition. Ms. Robins has expended her sick and vacation leave whenever she has been unable to work due to her injury. Ms. Robins believes those periods represent temporary total disability. As a result, she seeks reimbursement for her leave days.

The medical opinions of Dr. Yokochi and Dr. Portner, coupled with the radiologist's interpretation of the MRI, establish that Ms. Robins suffered a work-related injury to her neck in December 2001. Dr. Portner has continued to provide treatment for Ms. Robins' neck condition and she has responded favorably to his treatments, which helps establish that his treatment was

[3]TR, pages 8 to 14 and 28 to 37, and closing brief, dated August 27, 2003.

necessary. The contrary medical opinion of Dr. Nakano is much less probative because he discounts the conclusions of the MRI radiologist, knows very little about Ms. Robins' accident and situation, and believes no objective medical evidence exists to show a present work-related injury. Instead, again with little knowledge of Ms. Robins' background, Dr. Nakano considers her persistent headaches to be a pre-existing condition.

Employer[4]

During the initial treatment after her December 2001 accident, an x-ray indicated that Ms. Robins had not sustained a fracture. Dr. Yokochi treated Ms. Robins for a number of months and she gave at least one indication of satisfaction with his treatment. Eventually, after physical therapy, Dr. Yokochi cleared Ms. Robins for return to regular duty on a number of occasions between May and October 2002.

Following her initial visits with Dr. Yokochi, Ms. Robins indicated that she was satisfied with his treatments. However, when Dr. Yokochi cleared Ms. Robins for return to duty in August 2002, Ms. Robins requested a different choice of physician. Absent a showing of good cause, Ms. Robins is not entitled to another choice.

Further, the Employer is not responsible for the medical costs associated with Dr. Portner because Ms. Robins failed to comply with the regulatory provisions under both emergency and change of physicians situations. Specifically, she obtained treatment from Dr. Portner without notifying the Employer or obtaining permission for the change of physician from the Employer.

Based on their evaluations, Dr. Nakano, Dr. Kienitz and Dr. Smith believe Ms. Robins' headaches relate to a pre-existing condition. Their consensus outweighs the sole opinion of Dr. Portner. Additionally, since Dr. Portner only conducted a minimal evaluation in September 2002 and only suggested treatment plans, his office visit was both unnecessary and unreasonable. Ms. Robins has also failed to provide any evidence of the cost of Dr. Portner's visit.

Ms. Robins' assertions that she was forced to take both vacation and sick leave are not supported by the evidence in the case. According to Ms. Robins, she would take sick leave before taking vacation leave due to her injury. Based on that statement, since Ms. Robins had over 190 sick leave hours remaining at the close of 2002, she was not compelled to take any of her 2002 vacation days due to her claimed injury.

Based on Ms. Robins' representation that she was capable of returning to work, Dr. Yokochi released her to regular duty. She was not forced to return to work. Ms. Robins testified that her pain was tolerable. Because Dr. Yokochi has cleared Ms. Robins for return to regular duty, she does not have a temporary total disability

Ms. Robins reached maximum medical improvement at the conclusion of her physical therapy. The more probative opinions of Dr. Nakano, Dr. Kienitz, and Dr. Smith establish that Ms. Robins' existing neck condition is due to degenerative changes that existed prior to the

[4]TR, pages 16 to 22 and 214 to 218, and closing brief, dated August 28,2003.

December 2001. Likewise, Dr. Nakano's determination concerning the nature and cause of Ms. Robins' headaches is more probative in light of the objective medical evidence than Dr. Portner's opinion.

Finally, the veracity of Ms. Robins' subjective pain complaints has been sufficiently challenged by contrary evidence in the record and her inconsistent and equivocal hearing testimony.

SUMMARY OF EVIDENCE

While I have read and considered all the evidence presented, I will only summarize below the information potentially relevant in addressing the issues.

Dr. Bernard M. Portner
TR, pages 38 to 89, CX 3, CX 12, and EX 24

In a medical report, Dr. Portner indicated that he examined Ms. Robins' neck and back on September 4, 2002. She presented with complaints of persistent and steady neck pain, rated seven out of nine. No pain radiation into arms was reported. Ms. Robins also struggled with headaches. According to Ms. Robins, her symptoms started after she was struck on the back by falling containers at work on December 12, 2001. Ms. Robins had a prior history of headaches; however, those headaches had been localized on the left side of her head and were not a problem prior to the accident. She was taking some prescribed migraine medication. After the accident, Ms. Robins had received some physical therapy, but no traction was involved.

Upon physical examination, Dr. Portner observed very limited neck movement and lateral bending. Rotation of the spine was painful and the neck and back areas were tender. Ms. Robins had decreased, bilateral upper extremities strength, which Dr. Portner stated was "probably secondary to pain." Dr. Portner diagnosed post-traumatic cervical and thoracic spine dysfunction. He believed her present headaches were due to the accident. Dr. Portner recommended: anti-inflammatory medication, an MRI, and cervical traction.

[Sworn Testimony - Direct Examination] Dr. Portner, board certified in physical medicine and rehabilitation,[5] first saw Ms. Robins in September 2002 when she presented with complaints of neck pain and headaches. Her subjective pain level was seven out of nine. She reported to have been struck in the neck and head by a hard object at work several months earlier. Based on Ms. Robins' description of her accident, Dr. Portner believes the large board that struck Ms. Robins could have caused some damage. Upon physical examination, he noted limited range of motion and tenderness in her cervical spine. Dr. Portner diagnosed cervical and thoracic dysfunction (or pain). He recommended an MRI of the neck.

Dr. Portner reviewed portions of Dr. Yokochi's treatment notes. Her complaints of nausea and headaches are consistent with symptoms of a traumatic blow to the neck and head. Her subsequent complaints of radiating arm pain were consistent with disc impingement of a

[5]Over the objection of Employer's counsel, I accepted Dr. Portner as a expert in physical medicine and rehabilitation (TR, pages 38 to 40).

nerve. Dr. Yokochi's initial treatment plan of physical therapy and work restriction of sedentary labor were reasonable. Dr. Yokochi's contemplation of a referral to a physiatrist or neurologist was also appropriate. Dr. Portner observed that in March 2002, Dr. Yokochi still found limited range of motion and diagnosed improvement in thoracic pain secondary to contusion and sprain/strain. However, Dr. Portner believes Dr. Yokochi's decision to return Ms. Robins to work was unreasonable because, even though Ms. Robins had completed physical therapy, Dr. Yokochi had not conducted another examination.

When Ms. Robins reported continued neck pain to Dr. Yokochi in May 2002 after her return to work, he found limited range of motion in her neck. If she had been forced to exceed her range of motion at work, that situation could have aggravated her neck problem and increased discomfort. At that time, Dr. Portner believed returning Ms. Robins to work with "a fairly rigorous physical routine" was unreasonable. Based on Dr. Yokochi's treatment notes for June 2002 that Ms. Robins complained about increased symptoms which caused her to miss a couple of days of work, she should have been relieved of duty and treated more aggressively for her condition. At the same time, Dr. Yokochi's return to work with limited physical activity was reasonable. If such limited duty was unavailable, Dr. Portner opined Ms. Robins should not have worked. That limitation is connected to the injury she suffered on December 12, 2002. In late July 2002, Dr. Yokochi noted his observation that Ms. Robins' continued headaches were related to her previous migraine headaches. Dr. Portner disagrees with that conclusion and believes Ms. Robins' head pain is related to her December 2001 accident. Dr. Portner finds no medical foundation for Dr. Yokochi's August 2002 determination that Ms. Robins be released to regular duty. He would not have returned her to work, especially without another examination or MRI. At the same time, Dr. Portner has occasionally returned patients to work who insist, even if the decision is not supported medically. Based on Dr. Yokochi's September 2002 treatment notes, it was unreasonable to return her to regular duty. According to Dr. Portner, Ms. Robins has not reached maximum medical improvement ("MMI").

When Dr. Portner first examined Ms. Robins, she discussed her previous history of headache problems and explained that the prior headaches had occurred in a different location in her head. Dr. Portner is aware that Ms. Robins' work as a stevedore required both climbing containers for lashing tasks and driving heavy equipment. He is a physiatrist.

Dr. Portner would have taken a more aggressive approach and obtained an MRI. Additionally, if physical therapy did not improve her range of motion, he would have next prescribed spinal injections. He considers acupuncture and herbal medication to be reasonable treatments. In light of her "difficult neck pain syndrome," and Dr. Yokochi's treatment notes from September 2002 about Ms. Robins' continued neck problems, vocational rehabilitation was a reasonable recommendation.

Dr. Portner reviewed the results of the September 13, 2002 MRI. The study reveals disc pathology. Ms. Robins has a large disc herniation at C5-6, a smaller disc herniation at C6-7 and a small protrusion at C4-5. Her clinical presentations are consistent with the MRI findings. The MRI does not disclose the etiology of the disc problems. At the same time, Dr. Portner noted that Ms. Robins' reported medical history did not include neck problems.

Dr. Portner also reviewed Dr. Nakano's April 2002 treatment notes. He disagrees with Dr. Nakano's assessment that Ms. Robins' current headaches are related solely to her pre-injury headaches. Dr. Portner explained that prior to her December 2001 accident, Ms. Robins was working regularly. Although she had a history of headaches, they were apparently controlled, intermittent, and isolated to one part of her head. Then, after the blow at work, Ms. Robins suffered a contusion, an injury to her neck, and experiences severe headaches in a different location on a daily basis. He characterized as "ridiculous," Dr. Nakano's conclusion that Ms. Robins' trauma from the December 2001 accident had been completely resolved.

[Cross-examination (EX 24)] Dr. Portner specializes in orthopedic medicine and rehabilitation. If a patient presents with a condition that requires a unique expertise or Dr. Portner needs assistance with a diagnosis, he will refer a patient to a specialist, including a neurologist.

When he examined Ms. Robins in September 2002, Dr. Portner was not familiar with her medical history prior to December 12, 2001. At the time of his evaluation, he had reviewed neither Ms. Robins' physical therapy record nor Dr. Yokochi's treatment notes. The purpose of his examination was to determine the cause of Ms. Robins' pain and to help her. In taking her history, Dr. Portner obtained the details of the accident. His physical examination included range of motion testing, muscle strength evaluation, reflexes notation, pin sensation and neck palpitation. Ms. Robins accomplished various neck motions and Dr. Portner recorded the limits of those motions and her reported pain. He diagnosed cervical dysfunction because he did not yet have sufficient information, such as EMG testing or an MRI, to be more specific. The term "dysfunction" means the neck was not moving normally and causing pain. At the time of this examination, Ms. Robins would not have been able to operate equipment that required her to turn her head over her shoulder.

According to Dr. Portner, migraine headaches do not cause cervical dysfunction. Additionally, while a neurological condition might cause cervical dysfunction, most of the time the dysfunction involves an orthopedic cause.

Dr. Portner attributed Ms. Robins' cervical dysfunction to her December 2001 accident because Ms. Robins reported that prior to her December 2001 accident she was working fine and everything was good. Then, since her injury, she had experienced persistent pain. People who suffer a neck trauma often develop headaches, called cervicogenic headaches. He didn't believe Ms. Robins' headaches were migraine because migraine headaches are usually accompanied by an aura, appear to be located on one side of the head, and are associated with other clinical symptoms. Ms. Robins didn't present with those symptoms. As a result, Dr. Portner attributes her headache to the neck pain. After the examination, he didn't assess whether Ms. Robins had degenerative cervical changes because he had no x-ray evidence. He prescribed anti-inflammatory medication for Ms. Robins' pain. Because pain is subjective, Dr. Portner relies on the truthfulness of a patient. Though subjective complaints are "down played," he believes pain complaints are a critical source of information. The suggested physical therapy would assist Ms. Robins with her pain and the restoration of neck function. Likewise, traction would stretch the cervical area.

Dr. Portner next saw Ms. Robins on March 31, 2003, after she aggravated her neck pain at work on March 26, 2003. She presented with complaints of neck, shoulder, and arm pain. According to Ms. Robins, she had been able to work and her neck pain had not been too bad until the March 26, 2003 incident. These symptoms suggested disc derangement and he diagnosed recurrent disc derangement, aggravated by work.

An earlier MRI had shown disc derangement which "is likely more likely than not" to be the result of the December 12, 2001 accident. Dr. Portner doesn't recall seeing the December 12, 2001 x-ray.

Nausea can accompany a neurological condition as well as a migraine.

At times, Dr. Portner will agree to return a patient to work even though he holds a contrary opinion. He relies a great deal on the patient's assessment of her ability to work. However, Dr. Portner does not believe Ms. Robins was ready to return to work when he examined her in September 2002. Based on Ms. Robins' representations, he knows she wants very much to keep her present job. As a result, he doesn't know whether he would have released her then.

Dr. Portner disagrees with Dr. Yokochi's decision to return Ms. Robins to work on May 20, 2002. While he is aware that Dr. Yokochi had discussed the situation with Ms. Robins, Dr. Portner believes Dr. Yokochi should have accomplished another examination prior to making his decision. On the other hand, Dr. Portner does not characterize Dr. Yokochi's decision as unreasonable. He acknowledges that based on Dr. Yokochi's frequent contacts with Ms. Robins, he was in the best position to make a conclusion about her return to work.

Work hardening is a sub-category of physical therapy that is usually accomplished as a patient nears maximum medical improvement. Dr. Portner believes Ms. Robins went through such a program. After completion of work hardening, and if Ms. Robins said she was capable of work, he would release her if an examination didn't show otherwise.

Dr. Portner is aware of Ms. Robins' past history of migraine headaches. He has not treated her for migraine headaches. He doesn't have an opinion on the issue but hasn't ruled out migraine headaches.

Since March 2003, Dr. Portner has treated Ms. Robins with traction, manual therapy, and neck mobilization. He also administered several cervical epidural shots on June 2, 2003. A week later, Ms. Robins reported marked improvement; her headaches were gone. Even though Ms. Robins experienced another neck incident on March 26, 2003, Dr. Portner believes all his treatments addressed conditions associated with the December 2001 accident. Additionally, while his treatments would have no effect on migraine headaches, his course of action would assist Ms. Robins with symptoms associated with both degenerative cervical changes and consequences of a traumatic neck injury. Had she received these treatments in September 2002, Dr. Portner believes the results would have been the same or better.

On July 7, 2003, Dr. Portner released Ms. Robins to regular duty, including the operation of heavy equipment. Upon examination, she had normal range of motion of her neck and her pain symptoms were vastly improved. Although she is not pain-free, and her condition is not 100% resolved, Ms. Robins now characterizes her symptoms as neck stiffness. She no longer has headaches. Dr. Portner noted there is no cure for the degenerative cervical changes.

An April 2003 EMG was negative for radiculopathy. Ms. Robins does not have any nerve injuries.

Dr. Portner has no reason to believe Ms. Robins was malingering. According to the physician, "if anything, I think she tended to understate her suffering." He found Ms. Robins to be an honest and cooperative patient. He doubts a malinger would have endured spinal epidural injections.

Dr. Portner agrees with Dr. Nakano's April 2002 conclusion that Ms. Robins suffered a closed head injury in December 2001. However, he disagrees with Dr. Nakano's opinion that the accident aggravated her pre-existing migraine headache condition. Dr. Portner explained, "the headaches that she came to me with were distinct in terms of location, temporal pattern, correlation with neck pain, and response to treatment compared to the preexisting headaches that she may have suffered intermittently prior to the accident in question."

Ms. Debbie I. Robins
TR, pages 91 to 213

[Sworn Testimony - Direct Examination] Ms. Robins, who is 43 years old, was a professional hula dancer for a few years after graduating from high school and then worked as a hotel phone operator for about ten years. She started working at Matson Terminals in June 1999 and earned about $80,000 that first year. In 2000, Ms. Robins earned about $140,000. Between January 1, 2001 and December 12, 2001, Ms. Robins received about $90,000.

She worked as a container station freight warehouseman. In that capacity, Ms. Robins would lash and unlash chains around trailer containers that were stacked two high. She would climb on the containers with a ladder. If the containers were more than two high, Ms. Robins used a mechanical lift. She also unloaded cars and had to turn her neck while driving to avoid damaging the vehicles. Ms. Robins also had an alternate job operating a hustler, a forklift vehicle. She received more pay operating that type of vehicle in the container yard. Each morning, their supervisor would assign their work. The opportunity to drive the Hustler would be rotated among the workers who wanted that job.

On December 12, 2001, Ms. Robins was working in the auto lot. She was removing and securing blocks from the empty shipping auto shipping containers and placing the blocks on a pallet. The 20 pound blocks are about five and a half feet long and four inches by four inches thick (CX 17). Ms. Robins and co-worker were lifting blocks onto a pallet. While she was bending down, placing a block on a pallet, the co-worker lost her grip on a block and it struck Ms. Robins in the back of her head. It was a strong impact. She lost vision, or blacked out, for a moment and then fell to her knees with pain and nausea. Another co-worker, who saw the block

strike her neck, escorted her to the break room. Her neck was sore. The department supervisor then directed that she be taken to the hospital. At that time, she didn't have any specific doctor in mind. She saw Dr. Yokochi who had an x-ray taken and prescribed medication.

She continued to see Dr. Yokochi. However, in January, when she wasn't getting better, Ms. Robins told Dr. Yokochi that she wanted to see another doctor. Afterwards, the Employer's representative indicated that a nurse would accompany her to the doctor. Eventually, Ms. Robins complained about the nurse and the nurse stopped attending her doctor visits for a while. Ms. Robins asked to see her own doctor but the Employer's representative told Ms. Robins that she didn't have a choice of doctors. Instead, the Employer's representative arranged an appointment with Dr. Nakano for a second opinion. Ms. Robins told Dr. Nakano about her neck pain and persistent headaches. He noted that she had experienced migraine headaches before. Ms. Robins then described to him the different type of symptoms. During the physical examination, Dr. Nakano did not ask Ms. Robins to move her neck.

Several years before the accident, while working as a hotel operator, Ms. Robins had developed severe headaches on the left side of her head and the back of her eye. Eventually, she experienced some numbness. After some tests, she was diagnosed with migraine headaches. She got headaches about three or four times a week; however, by December 2001, the problem had subsided. The headaches after the December 2001 accident would develop after spending the whole day keeping her neck rigid. The pain would start at the back of her neck and then move up into her so that her "whole head hurts."

Eventually, Dr. Yokochi told her that the headaches were unrelated to her accident. There was no light duty work available so she returned to regular duty and experienced pain. She returned to Dr. Yokochi and told him that she was interested in vocational rehabilitation. She understands the wages may not be the same level. She also expressed her interest in vocational training to the Employer's representative but was never offered the opportunity.

Dr. Yokochi told Ms. Robins that he rather she not work, but if she had to, he'd release her to work. Due to financial pressures, including loans, credit cards, and kids, she chose to return to work. However, her neck pain and headaches continued. Dr. Yokochi gave her the names of several physicians and she chose Dr. Portner, who provided some massage therapy and traction that temporarily helped her neck. She can't afford his continued treatment.

She also saw Dr. Smith who told her that another neck injury might paralyze her.

After the accident, Ms. Robins received workers compensation for a while. CX 14 is her pay record and shows that she returned to work in June 2002. The sick and vacation pay notations for August and November reflect time that she was out due to her neck pain. In March 2003 she received a strong jolt while operating a fork lift that hurt her neck. Prior to her accident, such jolts didn't bother her. At present, Ms. Robins continues to work. She still has neck pain and headaches. Occasionally, she misses work due to her injury-related condition and uses sick and vacation pay.

One of Ms. Robins' two sons is going to college. She pays for his education. When her financial problems became too great, Ms. Robins declared bankruptcy.

Ms. Robins seeks medical treatment from Dr. Portner.

[Cross Examination] Ms. Robins is a union member. She is not aware of her sick leave balances at the start of 2002 and 2003. Her primary job is warehouse person. At present, she helps load and unload containers from truck flat beds. Due to the change in work load in 2001, she was spending less time doing her alternate job.

After receiving a hard jolt while driving a forklift in March 2003, she told her supervisor that she was probably not able to do the alternate job anymore. That was the only time since her December 2001 accident when she told a supervisor that she could not do a particular job.

The x-ray taken by Dr. Yokochi showed that she did not have a fractured neck. Although Dr. Yokochi offered a treatment plan, and she was satisfied with his care for a couple of months, Ms. Robins became interested in seeing another doctor because she wasn't getting better fast enough. When she asked to see another doctor, the Employer's representative encouraged her to stay with Dr. Yokochi.

Ms. Robins did not obtain written permission from the Employer to see Dr. Portner. She is unaware of any such permission being obtained from the District Director. She saw Dr. Portner on September 4, 2002 and March 26, 2003.

Dr. Yokochi never told her that she was 100% fit to return to duty. She was not aware that he had made such a finding. However, Ms. Robins acknowledged that she had asked or begged Dr. Yokochi to return her to regular duty in May 2002 for financial reasons. Ms. Robins told him that she was capable of going back to work.

Ms. Robins may have missed some physical therapy appointments in April and May 2002. Due to sickness and lack of a car, her attendance was irregular. She's not sure why the physical therapy stopped. She never received any official notice.

If Dr. Yokochi reported in his treatment notes sometime prior to March 26, 2003 that Ms. Robins had indicated her neck pain was tolerable, Ms. Robins would not dispute that statement. Dr. Yokochi told her that the headaches were due to her neck problem. He never told her that the headaches were unrelated to the December 2001 neck accident.

Ms. Robins was sent to Dr. Nakano for a second opinion about her neck.

Ms. Robins may have contacted Matson Terminals in 2001 to determine the amount of her sick leave for 2001. She'd take sick days before using vacation days.

Ms. Robins paid a portion of Dr. Portner's fee for the September 2002 treatment.

[Re-direct Examination] Ms. Robins has private health insurance but is responsible for the doctor's visit co-payment. In preparation for the hearing, she requested sick and vacation leave information from the Employer. She never saw a response until the day before the hearing when her lawyer showed her a summary (CX 14).

According to her pay stubs (CX 13), Ms. Robins earned different rates of pay based on the type of work she was doing and duration of her overtime. Her regular pay and vacation and sick pay were subject to taxes and other payroll deductions.

Ms. Robins discussed with both Dr. Yokochi and the Employer's representative about being able to get a second opinion from a physiatrist or neurologist. She never was referred to a physiatrist. Dr. Portner is a physiatrist. After she told Dr. Yokochi that Dr. Portner recommended an MRI, she was given an MRI.

In September 2002, after he spoke with the Employer's representative, Dr. Yokochi told her that she couldn't transfer her care to Dr. Portner. In November 2002, through her attorney, Ms. Robins requested a choice of physicians.

Ms. Robins recalls going to more than 20 physical therapy sessions. The physical therapy record (CX 22) shows about 40 total visits, which seems to be correct. Her attendance was irregular due to illness and lack of transportation after her car was repossessed. She tried to fully participate with physical therapy.

Ms. Robins returned to work full time at the end of May 2002. However, she had not fully recovered from her injury as noted in the physical therapy record. Ms. Robins continued the home exercises prescribed at physical therapy and by Dr. Yokochi.

Because no light duty existed for her, Ms. Robins asked Dr. Yokochi to permit her to return to regular duty. Dr. Yokochi still recommended that she not return. If she returned to work, Dr. Yokochi indicated she should avoid lifting heavy objects and not strain her neck while turning. Regardless of the status of her headaches, Dr. Yokochi's consistent position was that Ms. Robins' neck problem had not been completely resolved.

Following a biopsy of the left side of her head in the late 1990s, Ms. Robins' migraine headaches subsided.

At present, there are several jobs on the docks, such as forklift driver, that she is not physically capable of accomplishing.

[Re-cross Examination] Ms. Robins acknowledged the purpose of physical therapy was to improve her strength so that she could return to work. She did tell Dr. Yokochi that she was capable of returning to work. On at least one form, Ms. Robins indicated that she was satisfied with Dr. Yokochi.

[Re-direct Examination] Ms. Robins believed that she was seeing Dr. Nakano for treatment. He prescribed some medication. Dr. Yokochi indicated Dr. Nakano might help her

with the headaches. Dr. Nakano told her the headaches were unrelated to her accident. She told Dr. Nakano about her neck, but he didn't give her any help for that problem. Her headaches persist.

[Re-cross Examination] Dr. Nakano did not give her a prescription.

Employer's Injury Report
CX 1

On December 18, 2001, the Employer reported that Ms. Debbie Robins had suffered work-related injury on December 12, 2001 in the Auto Lot. Ms. Robins suffered bruises to her neck and was treated by the physician of her choice. Her hourly wage was $28.49. The average weekly wage was $1,822.83.

Disability Compensation Summary
CX 1 and EX 7

Between December 13, 2001 and May 6, 2002, Ms. Robins received temporary total disability ("TTD") compensation totaling $20,011.66 at a weekly compensation rate of $966.08. From June 23, 2002 to August 4, 2002, Ms. Robins received an additional $5,034.50 in TTD payments.

Compensation Claim and Employer's Controversion
CX 1, EX 8, and EX 9

On August 28, 2002, Ms. Robins filed a disability compensation claim for injuries to her head, back and neck caused on December 12, 2001 when a 35 pound board fell on her back and neck. According to Ms. Robins, she was not treated by a physician of her choice. The next day, August 29, 2002, the Employer controverted Ms. Robins' claim to additional disability compensation and medical treatment for the injuries caused by the December 12, 2001 accident.

Witness Statements
CX 2

According to Ms. Maria Tuisamato, on December 12, 2001, she was loading blocks onto a pallet with Ms. Robins. A block slipped out of her hands and fell on Ms. Robins. According to Mr. Thomas Enos, who saw the accident, as Ms. Robins was bending down to pick up a block to load on a pallet, another block slipped out of Ms. Tuisamato's hands and hit Ms. Robins in the neck region. The nature of her injury was dizziness, and sore neck and shoulder.

Dr. Lance A. Yokochi
CX 4, EX 2, and EX 13

On December 12, 2001, Dr. Yokochi treated Ms. Robins for her work-related injury. Ms. Robins indicated that in the morning, as she was bending over, she was struck in the back of her head, over her neck, and onto her upper back by a heavy shoring block. While remaining

conscious, Ms. Robins experienced a brief black out. Initially, Ms. Robins experienced some tingling in her arms. After those symptoms were gone, she still had pain in the range of six to seven out of ten in the back of her head, neck, and upper back. Ms. Robins also complained about a continued headache. Ms. Robins' prior medical history was "insignificant." Upon physical examination, Dr. Yokochi reported the absence of any skin lesions, redness, swelling, or bruising in the cervical to thoracic spine area. Ms. Robins' eyes were responsive and showed no sign of trauma. The neurological examination was essentially normal. Ms. Robins was tender over the midline of her spine. Dr. Yokochi reviewed an x-ray with Ms. Robins. Although no fracture or acute bone ailments were present, the film showed degenerative changes and spurring of the cervical and thoracic spine with some disc narrowing. Dr. Yokochi diagnosed a mild concussion with a scalp contusion and cervical and thoracic spinal contusion. He placed Ms. Robins off duty and instructed her to take Tylenol, use cold compress, and return for another evaluation the next day.

Ms. Robins returned the next day, December 13, 2001, with little improvement. Ms. Robins reported slight headaches with mild nausea. Her spinal area remained tender. The neurological review was normal and Ms. Robins' upper extremity strength was normal and symmetrical. Dr. Yokochi noted that a radiologist, Dr. Peter Balkin, had confirmed his interpretation of the December 12, 2001 x-ray. Dr. Yokochi concluded Ms. Robins' condition had improved. However, as of December 14, 2001, until her next evaluation six days later, he restricted her to sedentary work with limited lifting, neck twisting, and bending. In addition to cold compresses, Dr. Yokochi prescribed Vioxx.

On December 19, 2001, Ms. Robins returned still slightly nauseated. Because the Vioxx made her feel ill, she stopped taking it. While the strength and neurological tests were normal, Ms. Robins had limited rotation of her spine. Ms. Robins was in mild to moderate distress, secondary to neck and upper back pain. She also demonstrated guarded tenderness over her spine. Dr. Yokochi stopped the Vioxx and recommended another anti-inflammatory medication. Ms. Robins declined additional medicine. Dr. Yokochi prescribed physical therapy for four weeks and imposed a light duty work restriction. Since light duty was not available, Ms. Robins had been off work.

Between January 4, 2002 and October 8, 2002, Dr. Yokochi conducted numerous evaluations of Ms. Robins, as set out below:

January 4, 2002 – due to a respiratory illness, Ms. Robins had not started physical therapy. Her condition remained unchanged. Dr. Yokochi prescribed home exercises involving stretching and warm compresses. He continued her modified sedentary work restriction.

January 23, 2002 – Ms. Robins had intermittent headaches and neck pain, especially at the end of the day. Her upper extremity strength was normal. She displayed some para-cervical muscle tightness and limited range of motion. Dr. Yokochi liberalized her work restrictions and precluded extended sitting, standing or walking. He continued to restrict heavy lifting and excessive twisting or bending of the neck. The physician prescribed some medication for Ms. Robins' headaches. Ms. Robins was instructed to continue with physical therapy and home exercises.

February 6, 2002 – Ms. Robins reported good and bad days. On occasion, she experienced radiating left arm pain. Physical therapy was helping her. Upon examination, Dr. Yokochi noted extremely limited forward bending capability. He added a diagnosis of muscle tension headaches secondary to the spinal condition. Dr. Yokochi directed continued physical therapy and home exercise. He noted that if Ms. Robins' condition did not improve, an MRI may be appropriate.

February 20, 2002 – Dr. Yokochi discussed Ms. Robins' case with an Employer's representative. He observed that Ms. Robins' good attitude and attendance at physical therapy has improved her range of motion and strength. However, no improvement existed in Ms. Robins' subjective pain complaints, spinal tenderness and headaches. If Ms. Robins did not improved by the completion of physical therapy in March, Dr. Yokochi indicated a referral to a physiatrist or neurologist may be necessary.

March 1, 2002 – Ms. Robins reported that physical therapy was helping. However, she still had muscle tension headaches. Dr. Yokochi observed mild to moderate muscle tightness and some improved range of motion. His diagnosis and instructions remained the same.

May 1, 2002 – Dr. Yokochi met with the Employer's representative. He had planned to "probably" release Ms. Robins to return to work that day because she had completed physical therapy and had been on migraine headache medication for a couple of weeks. He planned to have another appointment and then release her to work. On the same day, Ms. Robins called the hospital and stated that she missed her scheduled appointment due to illness. Ms. Robins told the hospital representative that she was ready to return to work and asked to be released, effective May 7, 2002. Dr. Yokochi then completed a return to work release and scheduled a follow-up appointment in two weeks.

May 20, 2002 – Ms. Robins reported that since her return to work two weeks earlier, she was experiencing increased neck pain and headaches, principally due to heavy lifting. Although the migraine medication helped, she was taking large doses. Ms. Robins displayed mild distress secondary to neck pain and headaches. She had mild tenderness and unguarded mild to moderate muscle tightness. Dr. Yokochi diagnosed migraine headaches aggravated by her accident. Dr. Yokochi and Ms. Robins reviewed Dr. Nakano's consultation report. Dr. Yokochi suggested Ms. Robins try one of the other medications suggested by Dr. Nakano.

June 24, 2002 – Ms. Robins returned to Dr. Yokochi with a complaint of increased neck pain. Since her last visit, for about a month, her pain had been tolerable. She had continued to do her home exercises which helped. However, a recent increase in work activity had also increased her symptoms. In particular, she experienced problems when driving a fork lift because she had continue looking up. Due to the symptoms, she did not go to work the day before and came to Dr. Yokochi for help. Dr. Yokochi observed mild tenderness and unguarded muscle tightness. He diagnosed cervical-thoracic pain secondary to the contusion, sprain/strain and placed Ms. Robins off-duty for June 23 and 24. Additionally, as of June 25, 2002, Dr. Yokochi modified her work status and limited multiple activities including heavy lifting and excessive neck bending. Dr. Yokochi instructed Ms. Robins to attempt to slowly return to her regular duties.

July 19, 2002 – Seeking a prescription refill for pain medication, Ms. Robins visited Dr. Yokochi with an achy neck and continued headaches. Since the Employer cannot accommodate the modified duty restrictions, Ms. Robins was presented with a dilemma. She wanted to keep her high paying job but the work worsened her symptoms. Dr. Yokochi refills the prescription. Both the physician and an Employer's representative discussed with Ms. Robins the choice between return to work and vocational rehabilitation.

July 31, 2002 – Dr. Yokochi reviewed Dr. Nakano's second consultation report with Ms. Robins and the Employer's representative. He indicated the current headaches appeared to be migraine in nature and thus should be treated privately. Concerning her work, Dr. Yokochi observed that Ms. Robins had two types of work: her regular job and an alternative job. Only the later activity appeared to increase her symptoms. Ms. Robins responded that as a member of the union, she could not decline the alternate job. Consequently, Ms. Robins had to decide whether to continue working for the Employer and "tough it out" or find another job. Ms. Robins indicated that she could not afford to leave the high paying job. She also stated the prescribed medication was helping with her headaches. Dr. Yokochi continued Ms. Robins' modified work restrictions through August 4, 2002. Then, as of August 5, 2002, Dr. Yokochi released her to regular duty. He prescribed home exercise and intended to re-evaluate her condition a month later. On a subsequent form, Dr. Yokochi noted that further medical treatment, consisting of a follow-up evaluation in four weeks, was required.

September 4, 2002 – Dr. Yokochi gave Ms. Robins a follow-up examination. Ms. Robins reported being more achy recently and unable to work the day prior to her visit. She had been unable to do all the required lifting and carrying. Upon physical examination, Dr. Yokochi found tenderness over the spine and unguarded mild to moderate muscle tightness. He diagnosed cervical – thoracic pain secondary to her accident and injury. Dr. Yokochi added, "Her flares of pain are predictable and that her continuing duties irritate her existing condition."

While he understood her financial motivation, Dr. Yokochi stated that lighter duty would help her symptoms. He explained that she could expect flare-ups of her condition if she continued working with the Employer. Although her neck had not completely resolved 100%, Dr. Yokochi indicated there was nothing more that could be done for her. He concluded she had reached maximum medical improvement. He suggested that Ms. Robins may have to take sick leave days to give her neck a rest when the pain flared. Dr. Yokochi placed Ms. Robins on out of work status for September 3 to September 10, 2002. As of September 11, 2002, he released her to return to regular duty.

Dr. Yokochi noted that Ms. Robins had obtained a second opinion from Dr. Portner, who recommended an MRI. He informed the company representative that while the question of necessity for an MRI could go either way, he recommended the test for Ms. Robins' benefit. Ms. Robins had also completed an evaluation with Dr. Kienitz. Dr. Yokochi discussed that evaluation report with Ms. Robins. He disagreed with Dr. Kienitz's neck condition assessment. Dr. Yokochi believed Ms. Robins still had neck and upper back pain. At the same time, he explained to Ms. Robins that while her headaches were initially related to the injury, he had concluded that condition had become a separate problem. He did not consider her current migraine headaches to be related to her injury.

Finally, Dr. Yokochi indicated that Ms. Robins' continued medical treatment was related to her December 2001 accident. Concerning a permanent disability, Dr. Yokochi indicated the possible range was 0% to 5%, whole person; "one could argue one way or another."

September 23, 2002 – Dr. Yokochi annotated that Ms. Robins had expressed a desire to transfer her case to Dr. Portner. However, the Employer's representative informed Dr. Yokochi that Ms. Robins did not have the option to change doctors under the provisions of the Longshoreman Act.

Dr. Yokochi also discussed the MRI results with Ms. Robins, reporting the noted abnormalities at C4-5, C5-6, and C6-7. He recommended a spinal surgery consult but suggested that if surgery was not warranted, a more conservative approach might be epidural injections, as suggested by Dr. Portner, and a referral to a physiatrist or pain specialist. He diagnosed cervical-thoracic pain second to her contusion history, with evidence of a large C5-6 disc protrusion with nerve impingement. Distinguishing between the two problems presented by Ms. Robins, Dr. Yokochi explained that Ms. Robins "always had neck symptoms from her injury." At the same time, although the headaches were initially related to the accident, the headaches "since reverted to pretty much normal." As a result, his continued treatment had been warranted only for the neck symptoms. He placed Ms. Robins on "continued" modified light duty work restriction with no lifting or carrying of weight greater than ten pounds and no excessive bending or twisting of the neck. Dr. Yokochi also noted that no further medical treatment was required.

On a separate form, Dr. Yokochi indicated Ms. Robins intended to transfer her case to Dr. Portner.

On October 25, 2002, Dr. Yokochi approved Ms. Robins' return to regular duty, effective October 28, 2002.

Dr. Michael J. Meagher
CX 4

Doctor Meagher, a board certified radiologist,[6] interpreted a September 12, 2002 cervical MRI and noted three abnormalities. First, at C4-5, Ms. Robins had a small disc protrusion with slight right side cord impingement. Second, a large disc herniation was present at C5-6, with cord and nerve impingement. Third, a small disc herniation was present at C6-7.

Dr. Kenneth K. Nakano
CX 5, CX 16, EX 3, EX 4, EX 5, EX 6, EX 17, EX 21, and EX 23

On April 2, 2002, Ms. Robins was referred to Dr. Nakano, board certified in neurology, for neurological consultation evaluation. Initially, Dr. Nakano reviewed Ms. Robins' medical record and highlighted the following treatments involving head pain: April 1994 (headache with nausea and dizziness after physical work-out); April 1996 (blow to left side of head during a fall); June 1998 (numbness, swelling and tenderness left side of head with report of periodic problem of two years duration); September 1998 (diagnosed recurrent muscular contraction

[6]I take judicial notice of Dr. Meagher's board certification and have attached the certification documentation.

headaches; left temporal artery biopsy disclosed no pathology); February 2001 (headache diagnosis). Next, Dr. Nakano obtained an accurate description of the December 12, 2001 accident from various reports. He then reviewed Dr. Yokochi's treatment notes and noted the x-ray disclosed apparently degenerative neural narrowing at C4-5, C5-6, and C6-7. Dr. Nakano also established that Ms. Robins was receiving physical therapy treatments.

Prior to the physical examination, Ms. Robins presented complaints of neck pain and headaches. At that time, she was on a light duty restriction which essentially placed her off work. Upon physical examination, Ms. Robins was in no acute distress and showed no evidence of head trauma. Her neck had some resistance on movement. The neurological assessment was normal. Dr. Nakano found "no palpable abnormalities over the cervical, thoracic, or lumbosacral spines."

At the conclusion of his evaluation process, Dr. Nakano diagnosed Ms. Robins with a mild closed-head injury with mild concussion. Noting her past history of migraine-type headache, he stated, "the mild head injury aggravated her pre-existing migraine headaches without aura." Specifically, Ms. Robins' "current complaint and findings are consistent with migraine without aura precipitated by the incident of December 12, 2001." According to Dr. Nakano, Ms. Robins' prognosis was good. Her "sustained soft tissue contusion to her cervical and thoracic spine" should respond to appropriate treatment and management. Upon completion of her physical therapy, Dr. Nakano anticipated that Ms. Robins would reach maximum medical improvement and be capable of resuming her regular duty.

On April 22, 2002, Dr. Nakano added that he believed the December 12, 2001 accident had temporarily aggravated Ms. Robins' pre-existing migraine headaches. By the time of his April 2, 2002 examination, Ms. Robins had physiologically reached her pre-injury condition.

On July 24, 2002, Dr. Nakano again evaluated Ms. Robins, who was complaining about headaches and associated nausea. Ms. Robins had returned to work on May 7, 2002 and was able to accomplish her tasks with no problems. However, on the fourth week, Ms. Robins did her alternate job of driving a heavy equipment vehicle which caused neck pain and dizziness. She was placed off work on June 25, 2002.

Upon physical examination, Dr. Nakano found no change from his prior examination with one exception: Ms. Robins' "neck showed resistance, but there appeared to be physiologic complete ranges." He concluded Ms. Robins had neither neurologic nor physical residuals from the December 12, 2001 accident. Her clinical presentation could be explained by migraine headaches.

Dr. Nakano's earlier opinion remained "as stated." While Ms. Robins still had migraine headaches, she had reached maximum medical improvement because the trauma she suffered on December 12, 2001 had "physiologically resolved." "Her symptoms, presently do not relate to the December 12, 2001 date." Dr. Nakano cleared Ms. Robins for her regular work since only her alternative job caused "her to have symptoms and problems."

On September 26, 2002, Dr. Nakano reviewed Dr. Kienitz's report, Dr. Yokochi's latest treatment notes, and the MRI report. According to Dr. Nakano, although "the actual images were not produced," the reported findings "indicate protrusions rather than actual rupture or herniation of disk material. There is no evidence of radiculopathy." Dr. Nakano concluded the MRI showed degenerative changes consistent wit Ms. Robins' age and activities. The condition of her disks was not caused, aggravated or worsened by the December 12, 2001 incident. Dr. Nakano added one further comment, "It should be emphasized that Debbie Robins possesses self-reported subjective complaints that are totally dependent on her report and there exists no objective evidence of any residual physical, orthopedic, or neurologic injuries from December 12, 2001."

In a July 21, 2003 deposition, Dr. Nakano again discussed the highlights of his evaluations. On April 2, 2002, he conducted a medical record review and performed a general and neurological examination of Ms. Robins. His evaluation was not a treatment. Prior to the formal exam, Dr. Nakano observed that Ms. Robins had normal spontaneous neck movements. Dr. Nakano noted that on the day of the accident, Dr. Yokochi did not find any bleeding, swelling, or discoloration of Ms. Robins' neck. Her complaints were subjective. Since Ms. Robins reported an increase in headaches after the accident, Dr. Nakano believed the blow had aggravated her pre-existing migraine headache problem. Migraine headaches are recurrent and may be triggered by stress and lack of sleep. Ms. Robins' soft tissue injury, with no evidence of physical trauma, would be expected to heal within a few weeks. When Dr. Nakano mentioned several potential medicines for migraine headaches, he was not prescribing that medicine for Ms. Robins. Instead, he was merely making suggestions to her treating physician, Dr. Yokochi. Dr. Nakano concluded Ms. Robins had reached MMI on April 2, 2002 because she had no objective physical or neurological defects and was able to function with minimal medication.

When Ms. Robins returned in July 2002, she had additional complaints, including dizziness and nausea. Again, pre-examination, Ms. Robins was able to turn her head left and right without any problems. However, upon examination, Dr. Nakano noted resistance in her neck range of motion. He concluded the second examination was normal.

Dr. Nakano reviewed the MRI report and Dr. Smith's report and agreed with his conclusion. Notably, the radiographic evidence shows pre-existing degenerative disc disease. There is no evidence of nerve involvement.

He also reviewed Dr. Portner's report and disagreed with his diagnoses. According to Dr. Nakano, no objective evidence exists that Dr. Portner's suggested injections would be helpful. He also emphasized Dr. Portner should have considered Ms. Robins' prior medical history and compared the MRI with the earlier x-ray film from December 2001.

Dr. Nakano believes Ms. Robins reached MMI at the conclusion of physical therapy. She required no further treatment for any accident-related problem after that date. He again stressed that Ms. Robins' subjective complaints do not correlate with any physical, neurological, or orthopedic disorder.

A relationship usually exists between neck pain and migraine headaches. Over 75% of patients with migraine headaches also have neck pain. Neck pain can either cause, or be the result of, migraine headaches. As a result, Dr. Nakano attributes Ms. Robins' present symptoms to her migraine headaches.

Dr. Nakano does not think Ms. Robins claimed work-related injury on March 26, 2003 has any connection with the December 12, 2001 accident. Thus, he disagrees with Dr. Portner on that subject.

An EMG had been conducted of Ms. Robins and the results were normal.

When Dr. Nakano reviews medical records, he only evaluates the documents that are provided. He doesn't make an assessment whether the documents are complete. He charges $300 an hour for a physical examination and $250 an hour for a record review.

The MRI represents an objective finding of tissue change in Ms. Robins' neck consistent with degenerative changes. Dr. Nakano did not review any radiographic evidence developed prior to 2000; he is not aware if any such evidence exists.

Dr. Nakano just recorded Ms. Robins' responses. He has no opinion on whether she was magnifying her symptoms. Dr. Nakano formed no opinion about her credibility. He did not render a decision on whether she wanted to return to work. Ms. Robins did state that she enjoyed work and wanted to go back to work.

Ms. Robins' problem at C4-5 is located in an area usually not associated with a traumatic neck injury. A person with her condition at C5-6 usually would demonstrate other symptoms relating to nerve impingement, such as reflex deficits. In his review of the MRI scan, Dr. Nakano concluded the study showed protrusions rather than an actual disc herniation. That is, the disc material is bulging but has actually ruptured. According to Dr. Nakano, Ms. Robins has varying degrees of disc protrusions at C4-5, C5-6, and C6-7. As partial support for his conclusion, Dr. Nakano noted the April 2003 EMG show no nerve root involvement. With a herniated disc, Dr. Nakano would expect to see an abnormal EMG.

Dr. Yokochi did not refer Ms. Robins to him for neurological consult. Instead, the Employer's insurance company requested the evaluation.

Ms. Robins had a prior history of migraine headaches from 1994 and 1996. She placed the location of her pain on both sides of her head and on the left side. At that time, the associated symptoms were numbness, dizziness, and occasional blurred vision. A common consequence of a traumatic incident is a migraine headache. Dr. Nakano agrees that the December 2001 accident aggravated her migraine headaches because her symptoms increased. At the same time, "usually hard work does not precipitate migraine."

If subjective pain complaints don't correlate with objective findings, Dr. Nakano would conclude that no physical cause for the problem existed. He would inform a patient that no known pathology existed and recommend that the patient resume her normal activities. When

Ms. Robins completed her work conditioning physical therapy, she was neurologically and orthopedically capable of returning to her regular duties.

Dr. Nakano is aware that in March 2003, Dr. Portner had administered epidural injections and Ms. Robins reports they are helpful. Dr. Nakano disagrees with that treatment plan. Instead, he recommended a pharmacological approach to reduce the symptoms of headaches and neck pain. Had Ms. Robins taken her medication, she would have experienced an improvement. Traction can be utilized in certain patients with neurological impingement and associated neurological symptoms that have moved into the limbs.

Concerning the specific details of Ms. Robins' work as a heavy equipment operator, Dr. Nakano stated, "Well, the specifics of her actual manual activities, I'm not aware of them." Dr. Nakano's understanding of her work demands was based solely on the description Ms. Robins gave him. She had two types of work and one of those jobs involved operating heavy equipment. Ms. Robins described her climbing tasks, but didn't indicate how high she was required to climb. In light of Ms. Robins' description of her work, Dr. Nakano found no neurological reason to preclude her return to regular duties.

Ms. Robins has degenerative changes in her neck. Her ability to move her neck is "within a range consistent with the degenerative changes." Without additional information, Dr. Nakano doesn't know if Ms. Robins' prior occupations contributed to her neck condition. Her medical history did indicate an earlier blow to the head during a fall. That fall could have contributed to her degenerative cervical changes. On the other hand, the December 12, 2001 accident did not contribute to her degenerative neck condition because the contemporaneous x-ray showed the condition pre-existed the December 12, 2001 traumatic incident. Ms. Robins' degenerative changes cumulated over several years. The September 2002 MRI shows no further deterioration of her neck condition in nine months.

Dr. Ronald Kienitz
CX 6, EX 10, EX 11, and EX 18

On August 15, 2002, Dr Kienitz, board certified in occupational medicine, conducted a medical record review and physical examination of Ms. Robins. During the record review, Dr. Kienitz obtained a description of Ms. Robins' December 12, 2001 accident. He also summarized the contents of Dr. Yokochi's treatment notes, Dr. Nakano's April 2002 evaluation, the physical therapy treatment notes, and the neck x-ray. Dr. Kienitz also noted Ms. Robins' pre-injury history of recurrent, chronic headaches.

Upon examination, Ms. Robins indicated that she had recently been able to return to duty. While able to tolerate the achiness, she still experienced a pattern of achy neck pain, some vision disturbances, and then a headache. The physical examination was generally normal. Cervical muscle spasms were absent. Ms. Robins did have slightly limited range of motion in her neck. However, her measured cervical range of motion "seem distinctly less than the more spontaneous ranges of motion that had been observed without measuring earlier in the examination."

Based on his record review and examination, Dr. Kienitz concluded that Ms. Robins' pre-existing and chronic headaches "have returned to pre-injury status." Additionally, her head injury and neck sprain had resolved. He found no objective evidence of migraine cephalgia. Ms. Robins' mild to moderate neck range of motion deficits seemed "somewhat inconsistent." Dr. Kienitz opined Ms. Robins had reached maximum medical improvement for her December 2001 injury and did not require any further medical treatment related to her injuries. He concurred with Dr. Nakano's assessment that Ms. Robins was physically capable of returning to work in her regular duties. Ms. Robins did not have a permanent partial disability due to her accident.

On September 26, 2002, Dr. Kienitz reviewed additional treatment notes from Dr. Yokochi, observing the physician's estimate of a 0% to 5% impairment rating. He also reviewed the recent MRI report. Based on this information, Dr. Kienitz added an additional diagnosis of significant, yet asymptomatic neural encroachment at C5-6. Concerning the origin of the disk problem, Dr. Kienitz indicated the lesion could have pre-existed the December 2001 accident. On the other hand, Dr. Kienitz suggested the disk lesion could also have been caused by a violent forward flexion of the neck due to a blow to the head. However, he was "unable to state with any degree of certainty whether the incident of record actually caused the disk lesion noted on the recent MRI." At the present time, Dr. Kienitz opined that Ms. Robins did not need any further medical treatment. Neither surgery nor additional physical therapy was warranted. At the same time, based on the MRI findings, Dr. Kienitz concurred with Dr. Yokochi's maximum conclusion about a permanent disability. According to AMA guidelines, since she suffered no radicular symptoms, Ms. Robins had a 5% permanent impairment rating.

Dr. Robert L. Smith
CX 7, EX 12, and EX 19

On October 14, 2002, Dr. Smith, a board certified orthopedic surgeon, reviewed Ms. Robins' medical record and conducted a physical examination. In his record review, Dr. Smith considered the following information: Dr. Yokochi's treatment notes, physical therapy treatment notes, Dr. Nakano's evaluation reports, Dr. Kienitz's evaluation report, and the cervical x-ray and MRI. According to Dr. Smith, the September 2002 MRI showed "old" disc profusions, "associated with large osteophytes[7]."

At the beginning of her examination, Ms. Robins told Dr. Smith that she had returned to work in May 2002; however, increased neck pain and headaches forced her off work again by the end of June 2002. In terms of physical demands, her regular duties required lifting up to 25 pounds. For greater weights, she used a forklift. At the present time, she was unable to move her neck due to pain and complained about headaches. She was not taking any medication.

Upon physical examination, Dr. Smith observed that Ms. Robins refused to move her neck; whereas earlier in their conversation, she had loosened up and moved her neck "freely, although with limited excursion." Dr. Smith found no weakness in Ms. Robins' upper arms and she did not have any sensory loss. Her reflexes were bilateral.

[7]Bony outgrowth.

Based on his medical record review and physical examination, Dr. Smith reached several conclusions. First, Ms. Robins' degenerative cervical disc and joint disease was unrelated to her December 12, 2001 accident. The December 2001 x-ray report and the September 2002 MRI demonstrate the abnormal cervical findings were pre-existing conditions. He also concurred with Dr. Nakano's finding that Ms. Robins did not have cervical radioculopathy. Second, in the absence of bruising, observable optical eye damage, and loss of consciousness, Dr. Smith stated the initial diagnosis of a mild concussion was not supported by the objective findings. Further, he found no objective basis for Dr. Yokochi's opinion that her continuing symptoms were related to the accident. In particular, Dr. Smith stressed the absence of any objective evidence of a relationship between her symptomatology and the accident by himself, Dr. Nakano, and Dr. Kienitz. Third, Ms. Robins' present headache complaints are similar to her past history of head problems. Fourth, her presenting "neck rigidity was not supported by the prior records." Major inconsistencies existed between her subjective complaints and objective findings and may be due to anxiety and muscle tension. Fifth, medical treatment through May 31, 2002, the date of the physical therapy discharge, was appropriate. However, Dr. Smith also stated based on Dr. Nakano's examination report, Ms. Robins reached maximum medial improvement on April 2, 2002. Sixth, concerning treatment for her "age-related degenerative disc disease," Dr. Smith recommended home exercises, a home cervical traction unit, and nonsteroidal anti-inflammatory medication, such as Motrin. Seventh, Ms. Robins was capable of performing her usual and customary work which requires lifting no more than 25 pounds. Her disc disease was stable. Eighth, Dr. Smith disagreed with a 5% disability rating because such a rating requires objective clinical findings.

Physical Therapy Treatment Notes[8]
CX 7 and EX 22

On January 8, 2002, Ms. Robins started physical therapy. A moderate deficit in active cervical range of motion was documented. The treatment plan involved reducing pain and active rehabilitation. By February 12, 2002, Ms. Robins was seeing some increase in her neck range of motion and strength. However, she had no change in her subjective pain complaints which included headaches.

On March 4, 2002, Ms. Robins took a functional assessment which showed her at a sedentary physical state. Work conditioning was recommended and started on March 7, 2002. A few weeks later, on March 29, 2002, the physical therapist reported that Ms. Robins' upper body was improving but there was little additional change in her neck range of motion and subjective pain complaints. She still had a deficit in overhead lifting.

By mid-April 2002, Ms. Robins was demonstrating some improvement but still had problems with overhead lifting and driving. On April 19, 2002, an increase in active cervical range of motion was noted. Ms. Robins was able to lift up to 25 pounds. Additionally, Ms. Robins' neck strength had improved, coupled with a decrease in subjective pain complaints.

On May 31, 2002, the physical therapist completed a discharge summary. Noting that the last treatment was provided April 19, 2002, the therapist set out the measurements of Ms.

[8]As summarized by Dr. Smith.

Robins' physical capabilities for three periods: initial, current, and discharge. Across the board, Ms. Robins had improved. However, notably, her current status was listed as full time, light duty; whereas her discharge condition was listed as full time, full duty. The reason indicated for the discharge summary was return to full time, full duty. Ms. Robins' attendance was characterized as "irregular" and her attitude was "good."

Choice of Physician Letter
CX 8

On September 11, 2002, through counsel, Ms. Robins "once again" requested that her treatment be transferred to Dr. Portner.

Medical Bill
CX 9

In an April 7, 2003 facsimile, a representative from Dr. Portner's office indicated that Ms. Robins' outstanding medical bill was $731.19, for treatments in March and April. However, payment was pending from her health insurance.

Payroll Hours
CX 14

The daily payroll log for Ms. Robins show her out of work after one and a half hours on December 12, 2001 to May 7, 2002 when she returned to work. She stopped working on June 25, 2002. During that period, Ms. Robins took four days of vacation. Ms. Robins worked again from August 5, 2002 to September 23, 2002. During this time frame, she took several days of both vacation and sick leave. Ms. Robins started full time work again on October 28, 2002 and continued through March 26, 2003. Again, several days of vacation and sick days were recorded during this period. After March 26, 2003, Ms. Robins' time is noted as either "sick" or "industrial" time.

Straub Clinic and Hospital Records – Ms. Robins
EX 13

In the summer of 1998, Ms. Robins presented at the clinic with a complaint of periodic headaches for the last two years on the left side of her head. The pain would last an hour or two and might occur once or twice a day. Eventually, a left temporal artery biopsy was accomplished which produced no significant findings. The diagnosis was recurrent muscle tension headaches.

On March 6, 2001, Ms. Robins was again seen at the hospital for headaches.

Accident Report
EX 20

On March 26, 2003, while working as a machine operator, Ms. Robins reported an injury to her neck. A hydraulic hose broke on her equipment which caused the vehicle to vibrate and shake.

Sworn Testimony of Mr. Dereck Urabe
(TR, pages 218 to 234)

[Direct Examination] Mr. Urabe is the industrial relations manager for Matson Terminals. According to Mr. Urabe, a warehouse person earns 196 sick leave hours a year and may bank up to 300 sick leave hours. As a result, at the close of a year, it's possible to reach a maximum of 496 hours. Sick leave pay starts the second day a person is out sick and is based on 7.4 hours of regular duty. Mr. Urabe reviewed Ms. Robins' payroll records. She started 2002 with a sick leave balance of 193.1 hours. She finished 2002 with 193 sick leave hours.

[Cross Examination] Sick leave is not intended to be used for work-related injuries. Sick leave hours are paid at the regular rate of pay. Sick leave appears on an employee's pay stub. Light duty is not available at Matson Terminals.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Stipulations of Fact

The parties have stipulated to the following facts (TR, pages 23, 24, and 239): On December 12, 2001 Ms. Robins was involved in a work place accident that occurred during, and in the course of, her employment with Matson Terminals. At the time of the injury, an employer-employee relationship existed between the parties. The applicable average weekly wage is $1,822.83.

Preliminary Findings

As a preliminary step in resolving the various issues presented to me, I must determine the injuries that Ms. Robins suffered on December 12, 2001 in the Matson Terminals' Auto Lot, Pier 51. Based on the record evidence, three types of injuries may have been caused by the traumatic blow to her neck and head: continuing neck pain, continuing headaches, and cervical disc damage.

If a claimant establishes the presence of an injury and the occurrence of a work-related accident that could have caused the injury, the courts and Benefit Review Board ("BRB" or "Board") have interpreted Section 20 (a) of the Act, 33 U.S.C. § 920 (a), to invoke a presumption on behalf of a claimant that, absent substantial evidence to the contrary, the injury was caused by the work-related accident. In other words, the Act establishes a causation presumption that such an injury is work-related.

To rebut the Section 20 (a) causation presumption, the employer must present specific medical evidence proving the absence of, or severing, the connection between the bodily harm and the employee's working condition. *Parsons Corp. v. Director, OWCP (Gunter)*, 619 F.2d 38 (9th Cir. 1980). The U.S. Circuit courts have rendered different views on the extent of such evidence. In *Brown v. Jacksonville Shipyards, Inc.*, 554 F.2d 1075 (11th Cir. 1990), the U.S. Court of Appeals for the Eleventh Circuit required the employer produce evidence which ruled out the possibility of a causal relationship between the claimant's employment and injury. On at least one occasion, the BRB has taken a similar position. *Quinones v. H. B. Zachery, Inc.*, 32 BRBS 6, (1998). On the other hand, in *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684 (5th Cir. 1999), the U.S. Court of Appeals for the Fifth Circuit rejected the "rule out" standard. Instead, according to that court, an employer must produce evidence that a reasonable mind might accept as adequate to support a conclusion that the accident did not cause the injury. Since Ms Robins' case arises in the Ninth Circuit, I turn to the case of *Stevens v. Todd Pac. Shipyards*, 14 BRBS 626 (1982) *aff'd mem.* 722 F.2d 747 (9th Cir. 1983), *cert. denied* 467 U.S. 1243 (1984) which tilts towards the *Conoco* standard. In *Stevens*, the appellate court affirmed a determination that where a work-related accident occurs which is followed by an injury, the employer need only to introduce medical testimony controverting causation, and does not have to prove another causation agent, to rebut the presumption.

Once the Section 20 (a) presumption is rebutted, it no longer controls the adjudication. *Swinton v. J. Frank Kelly, Inc*. 554 F.2d 1075 (D.C. Cir.) *cert. denied* 429 U.S. 820 (1976). Instead, all the evidence in the record must be evaluated and the causation issue is then based on the preponderance of the evidence. *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986).

With these causation principles in mind, I turn to each of the respective potential work-related injuries.

Continuing Neck Pain

Based on Ms. Robins' testimony about the accident,[9] as corroborated by the witness statements of Ms. Tuisamato and Mr. Enos, I specifically find that on the morning of December 12, 2001, when Ms. Tuisamato lost her grip, a long piece of board, weighing about 15 to 20 pounds, struck Ms. Robins on the back of the neck and head. The force of the blow was sufficient to make Ms. Robins dizzy. She temporarily lost vision and fell to her knees. Her supervisors were sufficiently concerned to take Ms. Robins to the hospital that day. When Dr. Yokochi examined Ms. Robins, she complained about neck pain. The subsequent physical therapy treatment notes demonstrate that shortly after her accident, and through at least April 2002, Ms. Robins could engage only in sedentary work and then light duty, partially due to limited range of motion in her neck and pain. However, the physicians disagree on whether after April 2, 2002, Ms. Robins' continuing neck symptoms and pain were accident-related.

[9]Dr. Nakano emphasized the absence of swelling, bruising, and redness on the day of the accident. To the extent his observations may be considered contrary evidence to Ms. Robins' recollection of evidence, I believe her corroborated testimony represents the preponderance of the evidence on the nature of the December 12, 2001 accident.

The medical record establishes that Ms. Robins from the date of the accident has persistently presented neck pain complaints. Since Ms. Robins' accident involved a blow to the back of her neck, and such an accident could reasonably cause neck pain, I conclude Ms. Robins has successfully invoked the Section 20 (a) presumption that her continuing neck pain is related to the December 12, 2001 work-related traumatic blow to her neck.

Principally through the testimony of Dr. Nakano, the Employer has presented medical testimony that challenges Ms. Robins' continued neck pain complaints in two related ways. First, based on the observable medical findings recorded on the day of the accident, in particular the absence of bruising, swelling, and redness of the neck area, Dr. Nakano questions whether the severity of the accident would cause the claimed continuing neck pain. Second, Dr. Nakano questions whether Ms. Robins' subjective complaints are sufficient evidence of a work-related injury since no objective medical evidence exists to identify the pathology of her claimed pain. Under the *Stevens* principal, I believe Dr. Nakano's opinion represents sufficient contrary evidence to rebut the Section 20 (a) causation presumption.

Since the causation presumption has been rebutted, I must determine whether Ms. Robins can establish by a preponderance of the evidence that her claimed persistent neck problems and pain are due to the December 12, 2001 accident.

Dr. Yokochi, Ms. Robins' treating physician, diagnosed a thoracic spinal contusion on the day of the accident. Over the next ten months, through a course of physical therapy, home exercise regimen, medication, and three attempts by Ms. Robins to return to work, Dr. Yokochi consistently diagnosed neck pain. He based his diagnosis both on Ms. Robins' subjective complaints and persistent, demonstrated "unguarded" mild to moderate neck muscle tightness during at least nine physical examinations from the date of the accident to September 4, 2002. During that period, although physical therapy improved Ms. Robins' neck range of motion, and being well aware of Dr. Nakano's two consultation reports, Dr. Yokochi nevertheless continued to treat her neck pain as an accident-related injury. On September 4, 2002, he expressly disagreed with Dr. Kienitz's contrary opinion. On September 23, 2002, Dr. Yokochi again asserted that Ms. Robins "always had neck symptoms from her injury."

In his April 2, 2002 examination, Dr. Nakano noted some resistance of Ms. Robins' neck upon movement. He also acknowledged her complaints of neck pain and headaches. Noting her prior medical history of migraine headaches, and post-accident increased head pain, Dr. Nakano opined that the December 12, 2001 accident aggravated Ms. Robins' pre-existing migraine headache condition. In turn, the neck pain was due to the aggravated migraine headache condition. At the same time, because he found normal physiological and neurological responses in his first examination, Dr. Nakano concluded any accident – related condition had resolved by that time. According to Dr. Nakano, after April 2. 2002, Ms. Robins' headaches, and by implication associated neck pain, were unrelated to her December 2001 accident. To emphasize his point, Dr. Nakano noted that in his July 2002 evaluation of Ms. Robins' neck, he found no physiological basis for her purported inability to fully maneuver her neck.

Following an extensive medical record review, and his August 2002 physical examination, Dr. Kienitz concluded that Ms. Robins' accident-related injuries were resolved.

Concerning her presenting neck pain and stiffness, Dr. Kienitz noted that her neck range of motion limitations during his examination were less than the pre-examination movements that he observed. Ms. Robins had reached MMI and no longer required medical treatment.

Dr. Portner, who became Ms. Robins' treating physician in March 2003, recorded in September 2002 that Ms. Robins presented with a significant neck pain complaint. He observed Ms. Robins experienced pain as she attempted to move her neck in various directions. He also found decreased bilateral upper extremity strength that was probably secondary to neck pain. Based on this presentation, Dr. Portner concluded Ms. Robins' neck pain symptom was consistent with receiving a blow to the neck and head. Dr. Portner subsequently reviewed Dr. Yokochi's treatment notes and observed that Ms. Robins' other symptoms, including headaches were consistent with her described neck accident. Further, he highlighted that in the spring of 2002, Dr. Yokochi found Ms. Robins had neck pain and limited range of motion. Dr. Portner emphasized that prior to the accident, Ms. Robins had no reported history of neck pain problems. Finally, between March 2003 and July 2003, Dr. Portner successfully treated Ms. Robins for her neck symptoms. Her pain symptoms have vastly improved and she reports only a stiff neck.

After a review of Ms. Robins' medical record and his October 2002 physical examination, Dr. Smith concluded no objective evidence existed at that time to link Ms. Robins' presenting symptomalogy, which included neck pain, to the December 2001 accident. While Ms. Robins moved her neck freely while talking to Dr. Smith, upon physical examination, she refused to move her neck. Because Ms. Robins' upper extremity strength, senses, and reflexes were normal, he found a significant inconsistency between her symptoms and objective medical findings. While the discrepancy might be due to anxiety and muscle tension, Dr. Smith found no objective medical basis for Dr. Yokochi's conclusion that Ms. Robins' on-going complaints were related to her accident. At the same time, Dr. Smith also stated that the medical treatment through the end of May was appropriate and Ms. Robins reached MMI on April 2, 2002 as determined by Dr. Nakano.

In sorting through this medical dispute, I must assess the relative probative value of these diverse assessments based on three factors, documentation, reasoning, and the Benefits Review Board's standard on subjective pain as an injury.

As to the first factor, a physician's medical opinion is likely to be more comprehensive and probative if it is based on extensive objective medical documentation such as radiographic tests and physical examinations. *Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985). In other words, a doctor who considers an array of medical documentation that is both long (involving comprehensive testing) and deep (includes both the most recent medical information and past medical tests) is in a better position to present a more probative assessment than the physician who bases a diagnosis on a test or two and one encounter.

The second factor affecting relative probative value, reasoning, involves an evaluation of the connections a physician makes based on the documentation before him or her. A doctor's reasoning that is both supported by objective medical tests and consistent with all the documentation in the record, is entitled to greater probative weight. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). Additionally, to be considered well reasoned, the physician's

conclusion must be stated without equivocation or vagueness. *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988).

The third factor relates to whether a physician's opinion is consistent with the BRB's determination of subjective pain as an injury. According to the Board, *credible* complaints of subjective symptoms and pain may be sufficient to establish an injury under the Act.[10] *See Sylvester v. Bethlemhem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom., Sylvester v. Director,* OWCP, 681 F.2d 359 (5th Cir. 1982). A claimant's credible complaints of pain alone may be sufficient to establish an inability to return to work. *Anderson v. Todd Shipyards Corp*., 22 BRBS 20 (1989).

Applying these principles, I find the documented and reasoned assessments of Dr. Smith, Dr. Kienitz, and Dr. Nakano on the issue of continuing neck pain have diminished probative value in relation to the assessments of Dr. Yokochi an Dr. Portner for two reasons.

First, after noting some limited neck movement upon examination, Dr. Kienitz, Dr. Smith, and Dr. Nakano each discounted that finding due to other observed inconsistencies. Yet, significantly, none of these physicians specifically expressed a belief that Ms. Robins was either magnifying her symptoms or malingering. Dr. Smith suggested the noted differences in the range of Ms. Robins' neck movements might be due to anxiety or muscle tension. Dr. Kienitz was silent on the issue of credibility. And, Dr. Nakano specifically declined to make a credibility assessment. Instead, the physicians appear to base their conclusions that Ms. Robins does not have neck pain on the absence of objective medical evidence indicating the cause of the neck pain. Thus, because Dr. Kienitz, Dr. Smith, and Dr. Nakano did not specifically state Ms. Robins' pain complaints were not credible, the physicians effectively required, contrary to the BRB's principle, objective evidence to reach a conclusion that her neck pain was actually an injury.

In contrast, both Dr. Yokochi and Dr. Portner believed Ms. Robins' continuing presentation of neck problems were accurate and related to her accident. The two physicians found functional limitations in her neck in terms of range of motion that was associated with the neck pain. Having provided Ms. Robins nearly ten months of treatment, Dr. Yokochi concluded Ms. Robins always had neck problems from her accident. Similarly, after his extensive review of Dr. Yokochi's treatment notes and his own treatment of Ms. Robins for a couple of months, Dr. Portner related Ms. Robins' on-going neck problems to the December 2001 accident. Additionally, addressing Ms. Robins' credibility head-on, Dr. Portner concluded Ms. Robins was honest and not malingering.

[10]At the hearing, I had an opportunity to assess Ms. Robins' demeanor as a witness. During her direct testimony, Ms. Robins was frank and readily responsive. Yet, upon cross-examination she became less certain, somewhat vague at times, and less candid. The difference was sufficiently notable that I mentioned my observation to Ms. Robins during a portion of her cross-examination. At that point, she appeared to become somewhat more cooperative. Additionally, I have found some inconsistencies in her testimony, such as her reported statement to Dr. Yokochi that her heavy equipment operator work was something she was required to do and her testimony that she could decline that assignment. These observations cause me to reflect closely on Ms. Robins' credibility. However, her varying demeanor and the few inconsistencies did not rise to a sufficient level to conclude she was not a credible witness.

Second, and more important, I believe both Dr. Yokochi and Dr. Portner, as Ms. Robins' treating physicians, were in a better position to assess the validity of Ms. Robins' neck problems and subjective pain complaints. While Dr. Kienitz, Dr. Smith, and Dr. Nakano had access to Dr. Yokochi's treatment notes, both Dr. Kienitz and Dr. Smith only examined Ms. Robins one time and Dr. Nakano conducted a physical evaluation just twice. In comparison, from the day of the accident through the next ten months, Dr. Yokochi had significant physician-patient contact with Ms. Robins. Likewise, from March 2003 through July 2003, Dr. Portner provided extensive treatment of Ms. Robins' neck problems which eventually diminished her neck symptoms to stiffness and greatly relieved her neck pain.

In Ms. Robins' case, this difference in the frequency of patient-physician contact is significant because Dr. Kienitz, Dr. Smith, and to some extent, Dr. Nakano, relied on their limited pre-examination observations to conclude that Ms. Robins' examinations symptoms were not consistent. As previously noted, Dr. Smith suggested anxiety or muscle tension might explain the inconsistencies. Those two factors were less likely to be present when Ms. Robins was being seen by her treating physicians.

Through more frequent observations and numerous patient contacts, Dr. Yokochi and Dr. Portner were better situated to observe, evaluate, and assess the significance of any observable clinical disconnects. Over the course of his multiple examinations and consults with Ms. Robins, Dr. Yokochi did not record any symptomatic inconsistencies. To the contrary, upon examination, he found her neck movements unguarded. Likewise, Dr. Portner reported clinical symptoms and neck movement limitations consistent with her accident. Additionally, the two doctors were able to physically assess the nature, extent, and progress of Ms. Robins' neck movement limitations and evaluate the parameters of her pain complaints over an extended period of time. Both these treating physicians, separately, and over different time periods found her pain complaints substantive and concluded that Ms. Robins' continuing neck problems and pain were related to her December 12, 2001 accident.

In summary, because Dr. Kienitz, Dr. Smith, and Dr. Nakano relied on their objective findings without specifically deciding whether Ms. Robins' pain complaints were credible, their assessments lose some relative probative weight. On the other hand, in light of their extensive treatments of Ms. Robins for her neck symptoms, I find the well documented and reasoned opinions of Dr. Yokochi and Dr. Portner have enhanced probative weight on the issue of Ms. Robins' neck pain. Accordingly, through the preponderance of the more probative medical opinions of Dr. Yokochi and Dr. Portner, Ms. Robins has established that since the December 12, 2001 accident, and beyond April 2002, she continued to struggle with accident-related neck symptoms and pain.

Continuing Headaches

The analysis of Ms. Robins on-going headaches closely parallels the neck pain inquiry. On December 12, 2001, Ms. Robins received a blow to the back of neck and head and suffered a momentary loss of vision, falling to her knees. Later, she developed headaches. As a result, Ms. Robins is able to invoke the causation presumption. However, that causation presumption is then rebutted by several medical opinions that Ms. Robins' continuing headaches do not relate to

her accident. Consequently, I must once again evaluate all the evidence to determine whether Ms. Robins can prove that her continuing headaches are related to her December 12, 2001 accident.

Preliminarily, in additional to medical opinion, several other aspects of the evidentiary record are relevant on this issue. First, I have previously determined that Ms. Robins' description of her December 12 2001 accident is accurate. Next, over the course of several years prior to her accident, Ms. Robins periodically suffered migraine headaches about three to four times a week. At times, she experienced nausea and vision problems with the headaches. In 1998, Ms. Robins was evaluated for a complaint of a two year history of periodic headaches localized on the left side of her head and behind her eye, which occasionally was accompanied by numbness. Due to the localized nature of her headaches, a temporal artery biopsy was accomplished on the left side of her head in attempt to determine the cause of pain in that area. The biopsy was normal and eliminated the artery as a cause of the headaches. Ms. Robins returned to a doctor in March 2001 with another problem headache.

Turning to the medical opinion on Ms. Robins' headaches, Dr. Yokochi annotated Ms. Robins' reports of headache and associated nausea on the day after the accident, and a week later. On February 6, 2003, Dr. Yokochi had added a diagnosis of muscle tension headaches, secondary to her spinal condition. A month later, after noting mild to moderate neck muscle tightness, Dr. Yokochi again stated Ms. Robins had muscle tension headaches. Subsequently, after Dr. Nakano's first evaluation and Ms. Robins' use of migraine headache medication, Dr. Yokochi changed his diagnosis. Specifically, on May 20, 2002, Dr. Yokochi determined that Ms. Robins' headaches were due to an aggravation of her migraine headache condition by the accident. Then, on July 31, 2002, Dr. Yokochi stated Ms. Robins' headaches were migraine in nature and no longer related to the accident. On September 23, 2002, Dr. Yokochi indicated that while she initially had accident-related headaches, Ms. Robins' headaches had since reverted to "normal."

After his review of Ms. Robins' medical record and two evaluations in April and July 2002, Dr. Nakano concluded that the December 12, 2001 mild head injury had temporarily aggravated Ms. Robins' pre-existing migraine headache condition. He reached this conclusion principally because Ms. Robins experienced a marked increase in headaches after the accident. However, by April 2002, Dr. Nakano believed Ms. Robins' headaches were no longer related to the accident. He noted the absence upon examination of any evidence of physiological or neurologic injuries due to the accident, and stressed the symptom similarities between Ms. Robins' present headaches and her prior migraine headache history.

Dr. Portner reported in September 2002 that Ms. Robins struggled with headaches. She described her history of migraine headaches. However, those prior headaches had occurred in a different, and single, location of her head and had not interfered with her work prior to the December 2001 accident. Additionally, she reported taking migraine headache medication. Prior to the December 2001 accident, Ms. Robins' headaches were isolated, intermittent, and controlled. Her post-traumatic status headaches were severe, located in many portions of her head, correlated with neck pain, and were unaccompanied by the expected additional clinical symptoms of a migraine headache. Additionally, Dr. Portner stated that people who suffered

neck trauma usually experience headaches. Since Ms. Robins did not present with typical migraine headache symptoms, he concluded the headaches were related to her neck pain. Dr. Portner has not ruled out that Ms. Robins is also experiencing migraine headaches. However, he apparently sees the two types of headaches as separate problems because he states his therapy has resolved the accident-related headaches and may also have assisted Ms. Robins with her migraine headaches.

After Ms. Robins presented complaints of blurred vision and resulting headaches, Dr. Kienitz concluded at the end of his August 2002 examination that her headaches had returned to "pre-injury status."

In October 2002, Dr. Smith presented just one observation about Ms. Robins' post-accident headaches. He noted that her present headache complaints were similar to her medical history of head pain complaints.

Based on the above summaries, I first note that Dr. Yokochi, Dr. Nakano, and Dr. Portner are essentially in agreement that for the first few months following the accident, Ms. Robins' headaches were due to the accident either as an aggravation of her pre-existing propensity for migraine headaches or as muscle tension headaches. However, on the nature of Ms. Robins' continuing headaches after April/July 2002, Dr. Portner stands alone in concluding that Ms. Robins' headache complaints remain accident-related. Dr. Yokochi, the other treating physician, Dr. Nakano, Dr. Kienitz, and Dr. Smith believe her present headache situation is not tied to the accident. Instead, these four physicians opine Ms. Robins' head pain is a continuation of her problem with migraine headaches.

Interestingly, from my perspective, all five physicians used essentially the same documentation and reasoning to reach their disparate conclusions. Dr. Portner believed the characteristics of Ms. Robins' post-accident continuing headaches are sufficiently distinct to separate them from earlier migraine headaches. Dr. Yokochi, Dr, Nakano, Dr. Kienitz, and Dr. Smith reviewed the same information and found sufficient similarities, such as associated nausea and dizziness, to conclude Ms. Robins continues to struggle with migraine headaches unrelated to her accident.

My review of the medical evidence reveals support for both positions. Consistent with Dr. Portner's assessment, Ms. Robins' 1998 bout of migraine headaches was localized on the left side of her head; whereas, her present headaches are non-localized. On the other hand, as the other physicians relied upon, in 1994 and March 2001, Ms. Robins was treated for non-specific headaches at times accompanied by nausea and dizziness. With her present, non-specific headaches, Ms. Robins has also reported symptoms of nausea and dizziness. Since sufficient evidence exists to support both conclusions, I find the consensus opinion of Dr. Yokochi, Dr. Nakano, Dr. Kienitz, and Dr. Smith based on the interpretation of pre- and post-accident medical data on Ms. Robins' headaches represents the preponderance of the medical evidence. As a

result, Ms. Robins has failed to prove that her on-going headaches are related to the December 12, 2001 accident.[11]

Cervical Disc Condition

Causation

On the day Ms. Robins received a blow to her neck at work, an x-ray disclosed abnormalities in her cervical and thoracic spine. Several months later, Dr. Meagher interpreted an MRI and opined that Ms. Robins had two small disc protrusions at C4-5 and C6-7 and a large disc herniation at C5-6. At least one physician, Dr. Portner, suggested that the December 12, 2001 accident was more likely than not the cause of the disc herniation. Again, based both on the description of the December 12, 2001 accident and the subsequently identified abnormal cervical condition, I find Ms. Robins has presented sufficient evidence to invoke the presumption under Section 20 (a), that her disc protrusions and herniation were caused by the December 12, 2001 blow to her neck.

According to Dr. Nakano, Ms. Robins' cervical disc condition is due solely to degenerative changes and not related at all to the December 12, 2001 accident. Once again, Dr. Nakano's medical opinion represents sufficient contrary evidence to rebut the causation presumption. Accordingly, I return to consideration of all the medical evidence concerning the etiology of Ms. Robins' cervical disc problems.

After reviewing the September 2002 MRI, Dr. Kienitz described how a violent flexion of the neck could have caused Ms. Robins' disc lesion. At the same time, Dr. Kienitz indicated that her disc lesion could also have pre-existed her accident. As result, he was unable to state whether the December 2001 accident actually caused the lesion identified in the MRI. Since Dr. Kienitz did not indicate whether either cause was more likely, his medical opinion is not particularly probative on this issue.

As mentioned above, Dr. Portner believed that the disc derangement found in the September 2002 MRI more likely than not was caused by the December 12, 2001 blow to Ms. Robins' neck. However, his opinion on the cause of Ms. Robins' cervical disc condition has diminished probative value due to reasoning and documentation deficiencies. In terms of reasoning, during the first portion of his testimony, Dr. Portner stated that the MRI did not disclose the etiology of the disc problems. Yet, later in his deposition, without explanation, Dr. Portner expressed his opinion that the MRI showed a disc herniation likely caused by the accident. More significantly, Dr. Portner based his causation opinion on less documentation than other physicians who considered the issue. According to Dr. Portner, he could not recall whether he also saw the December 12, 2001 x-ray. Since Dr. Portner agreed the cervical disc problems may take years to develop, radiographic evidence of the spinal spurring and disc narrowing being

[11]To the extent such a determination is necessary, I rely on Dr. Yokochi's assessment as treating physician that by July 2002, Ms. Robins' continuing headaches no longer represented an aggravation of her pre-existing migraine headache condition.

present on the day of the accident seems to undermine his position that the accident likely caused the various disc protrusions and herniation.

Even if Dr. Portner's opinion about the cause of Ms. Robins' spinal abnormalities did not have diminished value, his conclusion would nevertheless be outweighed by the preponderance of the other probative medical opinion presented by Dr. Yokochi, Dr. Nakano, and Dr. Smith.

Though Dr. Yokochi did not express a direct opinion on whether the accident caused Ms. Robins' cervical problems, his interpretation of the December 12, 2001 x-ray points to a different cause. According to Dr. Yokochi, both he and the consulting radiologist concluded the x-ray showed degenerative changes and spurring of the cervical and thoracic spine with some disc narrowing.

Based on the same radiographic film, Dr. Nakano also reasonably concluded that Ms. Robins' cervical disc condition relates to her aging process and not the accident. He emphasized that the December 12, 2001 x-ray definitely showed Ms. Robins already had degenerative cervical spurring and disc narrowing when the accident occurred.

After reviewing the December 12, 2001 neck x-ray and the September 2002 MRI, Dr. Smith, an orthopedic specialist, reached the same conclusion. The radiographic evidence showed the presence of "old" disc profusions. Consequently, the December 2001 accident did not cause the cervical disc abnormalities.

Based on the preponderance of the more probative medical evidence consisting of assessments by Dr. Yokochi, Dr. Nakano, and Dr. Smith, I conclude the December 12, 2001 work-related accident did not cause Ms. Robins' cervical disc protrusions and herniation. Instead, her cervical disc condition was pre-existing on December 12, 2001.

Aggravation

If a claimant's employment aggravates a non-work-related, underlying disease or condition so as to produce incapacitating symptoms, the resulting disability may be compensable. *See Gardner v. Bath Iron Works*, 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981). Since I have determined Ms. Robins had a pre-existing disc derangement, I must also consider whether she can establish that the December 12, 2001 accident also aggravated that condition, such that her present cervical disc condition is indeed connected to the accident.

Prior to the accident, Ms. Robins did not have any notable neck problems. Afterwards, Ms. Robin had clinical presentations of neck pain coupled with both an x-ray and MRI that showed the presence of cervical disc abnormalities. As a result, the presumption that the accident aggravated her pre-existing abnormal neck structure is raised. Sufficient contrary evidence, in the form of a normal EMG and Dr. Nakano's medical opinion to rebut the presumption.

Upon consideration of the entire record, I conclude the preponderance of the medical evidence does not support a finding that the December 12, 2001 accident aggravated Ms. Robins' pre-existing abnormal cervical spine. While Dr. Portner expressed a belief that the accident probably caused the disc herniation, he was less clear about whether any of her presenting complaints represented aggravation of that condition. Dr. Portner indicated neck pain can have a neurological connection to a disc herniation; yet, he also stated neck pain usually involves orthopedic problems. Additionally, in light of the medical record, Dr. Portner readily acknowledged that Ms. Robins does not have any nerve damage.

As further evidence against a finding of aggravation, Dr. Nakano explained that Ms. Robins' disc abnormalities involve the potential compression of nerves. Upon two physical examinations, Dr. Nakano found normal neurological responses. Ms. Robins' nerve conduction test, EMG, also produced normal results. Both Dr. Nakano and Dr. Smith concluded Ms. Robins does not have cervical radioculopathy. Further, although he interpreted the December 12, 2001 x-ray as indicative of a pre-existing degenerative disc condition, Dr. Yokochi found Ms. Robins' neurological responses to be normal and never linked any of her neck pain complaints or headaches to aggravation of her cervical disc problems. Finally, Dr. Nakano noted that a comparison between the December 12, 2001 neck x-ray and the September 2002 cervical MRI, showed no change, or deterioration, in the condition of Ms. Robins' cervical discs in the nine months following the accident. Likewise, Dr. Smith characterized Ms. Robins' disc condition as stable.[12]

Issue # 1 - Nature and Extent of Disability

Having determined that Ms. Robins' continuing neck symptoms and pain are related to her December 12, 2001 accident, I turn to consideration of the nature and extent of any associated disability. Under the Act, a longshoreman's inability to work due to a work-related injury is addressed in terms of the nature of the disability (permanent or temporary) and extent of the disability (total or partial). In a claim for disability compensation, the claimant has the burden of proving, through the preponderance of the evidence, both the nature and extent of disability. *Trask v. Lockheed Shipbuilding & Constr. Co*., 17 BRBS 56, 59 (1985).

Nature

The nature of a disability may be either temporary or permanent. Although the consequences of a work-related injury may require long term medical treatment, an injured employee reaches maximum medical improvement ("MMI") when her condition has stabilized. *Cherry v. Newport News Shipbuilding & Dry Dock Co*., 8 BRBS 857 (1978). In other words, the nature of the worker's injured condition becomes permanent and the worker has reached maximum medical improvement when the individual has received the maximum benefit of medical treatment such that her condition will not improve. *Trask*, 17 BRBS at 60. Any disability suffered by a claimant prior to MMI is considered temporary in nature. *Berkstresser v.*

[12]At the end of March 2003, Dr. Portner diagnosed recurrent disc derangement aggravated by work. However, he did not specify what event triggered the aggravation and when his comment is placed in context, I conclude he was discussing the machine vibration incident that occurred on March 26, 2003.

Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984). If a claimant has any residual disability after reaching MMI, then the nature of the disability is permanent.

Each of the five physicians to consider Ms. Robins' post-accident condition presented an opinion on when she reached MMI. Initially, Dr. Nakano stated that Ms. Robins would reach MMI upon completion of physical therapy which was still on-going at the time of his April 2, 2002 physical examination. Later, in his July 2003 deposition, Dr. Nakano stated MMI occurred on April 2, 2002 because at that time Ms. Robins had neither objective neurological nor physical defects.

In a similar manner, Dr. Smith essentially presented two MMI dates. First, he concluded that the physical therapy Ms. Robins received for her injuries through May 31, 2002 was appropriate. Then, he agreed that based on Dr. Nakano's April 2, 2002 examination, Ms. Robins had achieved MMI by that date.

According to Dr. Yokochi, since Ms. Robins had completed physical therapy and expressed a capability to return to work, she reached MMI on September 4, 2002, even though her neck problem was not completely resolved. He added that she had a permanent 0 to 5% whole person impairment rating.

As of his August 15, 2002 physical examination, Dr. Kienitz stated Ms. Robins had reached maximum medical improvement because her neck sprain had resolved.[13]

Finally, having provided a regimen of medical treatment for Ms. Robins' neck problems between March 2003 and July 2003, which he believed were in part related to the December 2001 accident, Dr. Portner selected July 7, 2003 as the appropriate MMI date.

Relying on the more probative medial opinions of Dr. Yokochi and Dr. Portner, I have previously determined that Ms. Robins continuing neck symptoms and pain are related to the December 2001 accident. As a result, since Dr. Nakano and Dr. Smith based their MMI assessment on the resolution of her neck pain, which is contrary to my finding, their opinions have little probative value on the MMI date for Ms. Robins' continuing neck pain. For the same reason, Dr. Kienitz's August 2002 MMI date for resolved neck pain has little probative value.

Consequently, the question of MMI for Ms. Robins' continuing neck pain involves a dispute between her two treating physicians, Dr. Yokochi and Dr. Portner. In evaluating the relative probative value of these two assessments, the distinguishing feature is the extent of their documentation. Dr. Yokochi treated Ms. Robins from the date of her accident until September 2002. By the end of his relationship with Ms. Robins, she had experienced difficulty enduring for an expended period of time her work on the docks due to her neck problems on at least three different occasions. Dr. Yokochi believed she would continue to have problems with that work,

[13]Later, after reviewing the MRI, Dr. Kienitz agreed with Dr. Yokochi that Ms. Robins had a permanent disability. Due to her degenerative disc problem, Dr. Kienitz gave her a permanent 5% whole person impairment rating. However, I have concluded that Ms. Robins' disc lesions were neither caused nor aggravated by the December 2001 accident.

in the form of irritation and flare-ups of neck symptoms. Despite his concern, based on Ms. Robins' representations, he released her to work for a fourth time and essentially closed his case. In other words, Dr. Yokochi's documentation on Ms. Robins' neck problems stopped at the end of October 2002.

In comparison, Dr. Portner had more extensive documentation relating to Ms. Robins continuing neck symptoms. In addition to examining her in September 2002, and being aware of Dr. Yokochi's treatments, he began actively treating Ms. Robins for several months in March 2003 when she again experienced neck problems at work.[14] Thus, Dr. Portner's MMI assessment is more probative because it rests on a documentary basis that is both broader and more recent than Dr. Yokochi's information. Further Dr. Portner's MMI determination is probatively enhanced by the effectiveness of his treatments for Ms. Robins from March 31, 2003 to July 2003, which clearly demonstrate that until that period she had not received the maximum benefit from medical treatment.

In summary, based on Dr. Portner's most probative medical opinion on this issue, I conclude Ms. Robins reached maximum medical improvement for her neck symptoms and pain on July 7, 2003. As of that that date, the nature of her disability due to the December 12, 2001 accident changed from temporary to permanent.

As a final comment, I note that my finding that she reached MMI on July 7, 2003 does not preclude Ms. Robins receiving additional medical care for her neck symptoms and pain. As previously discussed, Dr. Portner's finding of MMI simply means that he does not expect continued medical treatment to improve her condition. In fact, Dr. Portner stated that Ms. Robins is still not 100% pain-free.

Extent

The question of the extent of a disability, total or partial, is an economic as well as a medical concept. *Rinaldi v. General Dynamics Corp*., 25 BRBS 128, 131 (1991). The Act defines disability as an incapacity, due to an injury, to earn wages which the employee was receiving at the time of injury in the same or other employment. *McBride v. Eastman Kodak Co*., 844 F.2d 797 (D.C. Cir. 1988). Total disability occurs if a claimant is not able to adequately return to her pre-injury, regular, full-time employment. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co*., 16 BRBS 190, 194 (1984). A disability compensation award requires a causal connection between the claimant's physical injury and her inability to obtain work. The claimant must show an economic loss coupled with a physical and/or psychological impairment. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Under this standard, a claimant may be found to have either suffered no loss, a partial loss, or a total loss of wage-earning capacity. Additionally, the employment-related injury need not be the sole cause, or primary

[14]I have considered the possibility that the equipment vibration incident on March 26, 2003 may have been a completely new injury unrelated in anyway to Ms. Robins' neck symptoms from the December 2001 accident. However, Dr. Yokochi indicated at the close of his treatment of Ms. Robins, her neck problems had not completely resolved. His prediction that she would experience another flare-up of neck pain was accurate. Further, only Dr. Portner has addressed whether the neck symptoms he started treating at the end of March 2003 were related to the December 2001 accident. He concluded they were. As a result, I find that Ms. Robins continued to have neck problems into March 26, 2003 when severe equipment vibration aggravated her existing neck pain.

factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachen Shipping v. Nash*, 782 F.2d 531 (5th Cir. 1986).

Initially, for two distinct periods, the Employer did not contest Ms. Robins' entitlement to temporary total disability compensation for injuries related to her December 12, 2001 accident. After the accident, Ms. Robins was not able to return to her regular and usual duties for several months until Dr. Yokochi released her to regular duty as of May 7, 2002. As a result, Ms. Robins suffered a total, temporary work-related disability ("TTD") from December 13, 2001 through May 6, 2002 (CX 1, CX 14, and DX 7). Subsequently, on June 24, 2002, Ms. Robins returned to Dr. Yokochi stating that she had been unable to go to work the day before due to increased neck pain associated with an elevated level of work at Matson Terminals. After diagnosing neck pain associated with the December 2001 accident, Dr. Yokochi modified her work status which precluded her return to work for several weeks. Subsequently, based on Ms. Robins' assurances, he released her to regular duty effective August 5, 2002. Thus, Ms. Robins suffered a total temporary disability from June 23, 2002 through August 4, 2002 (CX 1, CX 14, and EX 7). For these periods of TTD, the Employer's timesheets for Ms. Robins recorded 8.0 hours of "industrial" time (CX 14) and the company paid her $966.08 a week in disability compensation based on an average weekly wage of $1,822.83 (CX 1)

By the time Ms. Robins returned to Dr. Yokochi in September 2002, the Employer had contested her entitlement to continued disability compensation.[15] Consequently, I must determine whether Ms. Robins was entitled to additional disability compensation after August 5, 2002.

To establish a *prima facie* case of total disability, whether temporary or permanent in nature, a claimant has the initial burden of proof to show that she cannot return to her regular or usual employment due to work-related injuries. *See Newport News Shipbuilding & Dry Dock Company v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988). This evaluation of loss of wage earning capacity focuses both on the work that an injured employee is still able to perform and the availability of that type of work which she can do. *McBride*, 844 F.2d at 798. At this initial stage, the claimant need not establish that she cannot return to any employment, only that she cannot return to her former employment. *Elliot v. C & P Tel. Co*., 16 BRBS 89 (1984). A claimant's credible testimony of considerable pain while performing work may be a sufficient basis for a disability compensation even though other evidence indicates the claimant has the capacity to do certain types of work. *Mijangos v. Avondale Shipping, Inc*., 948 F.2d 194 (8th Cir. 1999); *Anderson v. Todd Shipyards Corp*., 22 BRBS 20 (1989).

If a claimant is able to demonstrate she is unable to return to her former job, then in the second step of the disability adjudication process, the employer has the burden of production to show that suitable alternate employment is available. *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986). The availability of suitable alternative employment involves defining the type of

[15]Based on the assessments of Dr. Nakano and Dr. Kienitz, and following Ms. Robins' August 28, 2002 claim for disability compensation, the Employer formally controverted Ms. Robins' entitlement of further disability compensation and medical treatment on August 29, 2002 (EX 8).

jobs the injured worker is reasonably capable of performing, considering her age, education, work experience and physical restrictions, and determining whether such jobs are reasonably available in the local community. *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765 (4th Cir. 1978) and *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).

During a follow-on examination on September 4, 2002, Ms. Robins reported increased neck pain which caused her to miss work the day before. Following his examination, Dr. Yokochi placed Ms. Robins in non-work status through September 10, 2002 (CX 4). Based in part on Dr. Yokochi's highly probative opinion, I have already determined that Ms. Robins' neck pain was a continuing injury related to her December 2001 accident. As a result, Dr. Yokochi's decision that Ms. Robins could not return to her regular job about one week establishes a *prima facie* case of total disability. Since the Employer did not present any evidence that other suitable alternative employment was available for that period, I find Ms. Robins suffered a total temporary disability from September 3, 2002 through September 10, 2002.[16]

On September 23, 2002, after reviewing the results of the cervical MRI with Ms. Robins, Dr. Yokochi placed Ms. Robins on "continued" modified duty due to her neck problems diagnosing in part, cervical-thoracic pain secondary to her neck contusion. Under his work restrictions, Ms. Robins could not: a) lift more than 10 pounds; b) stand, sit or walk for more than 1/2 hour; and bend or twist her neck excessively (CX 4 and EX 2). On October 1, 2002, Dr. Yokochi reiterated that Ms. Robins was still in a modified work status limiting her to light duty (CX 4 and EX 2). Eventually, Dr. Yokochi released Ms. Robins to regular duty effective October 28, 2002 (EX 2).

According to Ms. Robins, as a longshoreman she spent a portion of her time climbing and lashing shipping containers, driving cars on and off cargo ships, and occasionally operating heavy equipment and forklifts. The work required her to lift up to 25 pounds and bend her neck when climbing and driving. Comparing these work requirements with Dr. Yokochi's modified work restrictions, I find his opinion demonstrates that between September 23, 2002 through October 27, 2002, Ms. Robins was not capable of performing her regular duties due to her neck pain. Since the Employer has not indicated that suitable alternative employment was available for this period, I find Ms. Robins is entitled to total temporary disability compensation from September 23, 2002 through October 27, 2002.[17]

In addition to the days discussed above, Ms. Robins, through her counsel, asserts she is entitled to additional TTD compensation for the following days when Ms. Robins claims she was unable to work due to her accident-related injuries: four vacation days – May 2002; three vacation days – August 2002; one sick leave day, one vacation day, and one personal day – November 2002; one sick leave day, one vacation day; one personal day – December 2002; two sick leave days, one vacation day, and one personal day – January 2003; six vacation days, one sick leave day, and one personal day – February 2003; three sick leave days – March 2003; and ten sick leave days – April 2003.

[16]The Employer's timesheet records Ms. Robins' absences for these days as sick leave (CX 14).

[17]The Employer's timesheet records Ms. Robins' absences for this period as sick leave (CX 14).

Previously, I determined that Ms. Robins' neck pain complaints to the various physicians were generally credible. However, for the following reasons, I find Ms. Robins' assertion that her neck pain precluded her from working does not establish a *prima facie* case of total disability for these additional absences. First, concerning the May and August 2002 dates, Ms. Robins was still under Dr. Yokochi's care. On at least one occasion, June 24, 2002, she sought his assistance when she was unable to work due to her neck problems. Ms. Robins did not explain why she did not also go to Dr. Yokochi when her problems arose on the other days in May and August 2002. Second, in regards to all the claimed vacation and personal days, Ms. Robins testified that she would use her sick leave before using a vacation day to cover an absence when she was unable to work due to her neck problems. Yet, Ms. Robins did not establish that she had consumed all her available sick days prior to taking the vacation and personal days. Third, concerning the sick leave days for November 2002 through February 2003, her claim appears inconsistent with her representation to Dr. Portner at the end of March 2003 that since her treatment with Dr. Yokochi her neck pain had been tolerable up until the March 26, 2003 severe vibration incident. Fourth, the claimed sick leave days in March and April 2003 occurred during a period when Ms. Robins had come under Dr. Portner's care for her neck problem. The record contains no documentation from Dr. Portner about his assessment of Ms. Robins' ability, or inability, to work as a longshoreman after March 26, 2003.

Issue # 2– Choice of Physician

The issue concerning choice of physician in Ms. Robins' case relates to her decision to see Dr. Portner in September 2002.[18] Ms. Robins asserts that since she never picked Dr. Yokochi, her selection of Dr. Portner represents the exercise of her right under Section 7 (b) to freely chose a physician to treat her work-related injuries. The Employer objects to her selection of Dr. Portner. Dr. Yokochi provided emergency treatment for Ms. Robins on the day of the accident; subsequently, she continued to go to him for treatments over several months. Consequently, Ms. Robins' visit to Dr. Portner in September 2002 represents a change of physicians, from Dr. Yokochi to Dr. Portner. Because Ms. Robins failed to obtain the requisite written approval for that change in physicians, the Employer maintains it is not responsible for Dr. Portner's treatment costs.

When a claimant has demonstrated that she has suffered from a compensable injury under the Act, Section 7, 33 U.S.C. § 907, also requires the employer to furnish medical, surgical, and other attendant benefits and treatment for as long as the nature of the recovery process requires. *See Pardee v. Army and Air Force Exchange Service,* 3 BRBS 1130 (1981). Section 7 (b) provides that the employee has the right to choose an attending physician to provide the reasonable and necessary medical care. At the same time, according to Section 7 (c) (2), an employee may not change her initial choice of physician unless the employer has provided prior consent for such a change, which usually requires either a showing of good cause or the

[18]As relief, Claimant's counsel requested that I both designate Dr. Portner as the appropriate treating physician and direct the reimbursement for his medical treatment. In his closing brief, Employer's counsel indicated that after the March 26, 2003 equipment vibration incident, the Employer acknowledged that Dr. Portner is Ms. Robins' treating physician for the problems associated with that incident. Since Dr. Portner only saw Ms. Robins once, on September 4, 2002, before the March 2003 incident, my inquiry essentially relates to whether the Employer is responsible for the costs of Dr. Portner's September 4, 2002 office visit.

necessity of referral to a specialist. An employee is released from the requirement to obtain an employer's authorization for a change of physician once the employer has refused to provide medical treatment. *Wheeler v. Interocean* Stevedoring, 21 BRBS 33 (1988). Section 7 (b) further provides that if, due to the nature of the injury the employee is unable to select her physician and the injury requires immediate medical care, the employer may select the physician. In that event, the regulations, 20 C.F.R. § 702.405 state that afterwards the employee may change physicians when she is capable of making the selection; however, such a change still requires written authorization from the employer.

With these principles in mind, I return to the events of December 12, 2001. After being struck in the neck and head, Ms. Robins temporarily blacked out but did not lose consciousness. Her supervisor decided that she needed immediate attention so she was escorted to the hospital where she usually received treatment. According to Ms. Robins, she did not have any specific doctor in mind upon arrival and saw Dr. Yokochi.

Based on these circumstances, the December 12, 2001 hospital visit did not fall into the emergency situation contemplated by Section 7 (b). Ms. Robins had suffered a neck and head injury. The Employer did decide her condition required immediate care. And, the Employer's representative took her to the hospital. Yet, significantly, despite those facts, the accident did not incapacitate Ms. Robins. Since Dr. Yokochi was able to obtain a detailed medical history from Ms. Robins at the beginning of his examination, I conclude she retained the capacity to freely choose a physician on December 12, 2001.

The record is not clear who chose Dr. Yokochi on December 12, 2001. Ms. Robins certainly believes that she did not. Yet, she also testified that on the day of her accident she had no particular preference for a treating physician and simply stated that she ended up being seen by Dr. Yokochi. On the other hand, because the December 12, 2001 accident did not involve an emergency with an incapacitated employee, even if the Employer chose Dr. Yokochi on that day, that selection was ineffective and Ms. Robins retained her right to a free choice of physician.

Regardless of who selected Dr. Yokochi on December 12, 2001, I find that through her subsequent behavior Ms Robins did select Dr. Yokochi as her treating physician. After the initial evaluation and follow-on treatment the next day, Ms. Robins continued to see Dr. Yokochi for treatment of her neck problems and indicated on at least one occasion that she was satisfied with his treatment. Later, after she returned to work in May 2002 and then experienced increased neck problems a few weeks later, Ms. Robins chose to return to Dr. Yokochi.

I have considered Ms. Robins' direct testimony that when her condition did not improve in January 2002, she told Dr. Yokochi that she wanted to see another doctor. That representation is overcome by other evidence showing the request really occurred a couple months later. Notably, Ms. Robins remained actively engaged in the physical therapy prescribed by Dr. Yokochi which produced improvements in her condition through at least March 2002. On cross-examination, Ms. Robins also testified that she was satisfied with Dr. Yokochi's treatment for a couple of months. According to Ms. Robins, when she expressed her desire to see another doctor, the appointment with Dr. Nakano was made - that referral occurred in April 2002. Consequently, I find that after her initial visit with Dr. Yokochi and follow-up examination the

next day, Ms. Robins chose Dr. Yokochi as her choice of physician by continuing to accept and seek his treatment for several months.

Since I have concluded that by her subsequent actions, Ms. Robins effectively chose Dr. Yokochi as her physician, the Act required that she obtain prior approval from Matson Terminals before seeing Dr. Portner. At the hearing, Ms. Robins admitted she did not obtain written permission from the Employer prior to seeing Dr. Portner.

I have considered whether two situations might be interpreted as the Employer's refusal to provide medical treatment, which would have relieved Ms. Robins of the requirement to obtain prior approval from the Employer for her September 4, 2002 visit with Dr. Portner. Upon evaluation, I conclude neither circumstance is sufficient. First, on August 29, 2002, the Employer formally controverted Ms. Robins' entitlement to continued medical treatment for injuries sustained in the December 2001. That controversion did not amount to a refusal by the Employer to provide medical treatment at that time because the Employer nevertheless continued to pay Dr. Yokochi for his treatment of, and consultations with, Ms. Robins at least through September 23, 2002. Second, after Dr. Yokochi had recommended that Ms. Robins see a physiatrist in the late spring of 2002, the Employer sent her to a neurologist instead. That action did not amount to a refusal by the Employer to provide a necessary specialist because Dr. Yokochi's complete recommendation was that if the physical therapy proved unsuccessful, Ms. Robins should be referred to either a physiatrist or neurologist.

In summary, by continuing her treatments with Dr. Yokochi for several months, Ms. Robins chose Dr. Yokochi as her physician. Later, Ms. Robins failed to obtain the requisite Employer's authorization prior to the September 4, 2002 visit with Dr. Portner. None of the exceptions that might excuse that failure are applicable. Consequently, Matson Terminals is not responsible for the costs associated with the September 4, 2002 examination by Dr. Portner and Ms. Robins' request for reimbursement must be denied.[19]

ATTORNEY FEE

Section 28 of the Act, 33. U.S.C. § 928, permits the recoupment of a claimant's attorney's fees and costs in the event of a "successful prosecution."[20] Since I have determined issues in favor of Ms. Robins, her attorney, Mr. Friedheim, is entitled to submit a petition to recoup his fees and costs associated with his professional work before the Office of Administrative Law Judges. Mr. Friedheim has thirty days from receipt of this decision and order to file an application for attorney fees and costs as specified in 20 C.F.R. § 702.132 (a). The other party, and its counsel, Mr. Baldemore, has ten days from receipt of such fee application to file an objection to the request.

[19]Employer's counsel also challenged the necessity of Dr. Portner's September 4, 2002 evaluation. In that regard, I simply note that I have determined Ms. Robins had continuing neck symptoms and pain through July 2003 and that as part of his September 2002 examination, Dr. Portner suggested treatment and analysis modalities to address that problem.

[20]Since Ms. Robins was only partially successful, both parties should address the application of the analysis set out by the U.S. Supreme Court, in *Hensley v. Eckerhart,* 461 U.S. 424 (1983), made applicable to longshoreman claims in *George Hyman Const. Co. v. Brooks*, 963 F.2d 1532 (D.C. Cir. 1992).

ORDER

Based on my findings of fact, conclusions of law, and the entire record, I issue the following order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

1. The following portion of Ms. Robins' claim for TEMPORARY, TOTAL DISABILTIY compensation is **GRANTED**: The Employer, MATSON TERMINALS, **SHALL PAY** the Claimant, MS. DEBBIE I. ROBINS, compensation for TEMPORARY, TOTAL DISABILITY, from December 13, 2001 through May 6, 2002; from June 23, 2002 through August 4, 2002; from September 3, 2002 through September 10, 2002; and from September 23, 2002 through October 27, 2002, based on an average weekly wage of $1,822.83, such compensation to be computed in accordance with Section 8 (b) of the Act, 33 U.S.C. § 908 (b).

2. The remaining portion of the claim by MS. DEBBIE I. ROBINS for TEMPORARY, TOTAL DISABLIITY is **DENIED**.

3. The claim of MS. DEBBIE I ROBINS for reimbursement of medical expenses associated with a September 4, 2002 examination by Dr. Bernard M. Portner is **DENIED**.

4. The Employer, MATSON TERMINALS, **SHALL RECEIVE CREDIT** for all amounts of compensation previously paid to the Claimant, MS. DEBBIE I ROBINS, as a result of her December 12, 2001 injury.

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: February 2, 2004
Washington, D.C.

ATTACHMENT 1

American Board of Medical Specialties

Certification:

Lance Yokochi, MD

Certified by the American Board of Internal Medicine in:

Internal Medicine

American Board of Medical Specialties
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ATTACHMENT 2

American Board of Medical Specialties

Certification:

Michael J. Meagher, MD

Certified by the American Board of Radiology in:

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